TRANSCRIPT OF RECORD.

10.

SUPREME COURT OF THE UNITED STATES.

No. ~~297~~ 94

JAMES R. BOYD, JOHN J. BOYD, AND EDWARD HINCKEN, APPELLANTS,

vs.

OLIVER MOSES, CHARLES OWEN, FRANK O. MORE, G. C. MOSES, AND ALBERT OTIS.

[APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.]

FILED APRIL 19, 1887.

SUPREME COURT OF THE UNITED STATES.

No. 237.

JAMES R. BOYD, JOHN J. BOYD, AND EDWARD HINCKEN, APPELLANTS,

vs.

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a UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 210 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Oliver Moses, *et al*, libel'ts and appellees, against James R. Boyd, *et al*, resp'dts. and appellants, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of Feb'y, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-first.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5 ct. stamp.]

1 At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Thursday, the third day of May, in the year of our Lord one thousand eight hundred and sixty-six.

Present, the Honorable Samuel R. Betts, district judge.

OLIVER MOSES, *et al*, }
v. }
JAMES R. BOYD, *et al*. }

2 Feb'y 14, 1863, the libellants file their libel against the above-named respondents in the words and figures following, to wit:

3 To the Honorable Samuel R. Betts, judge of the district court of the United States, for the southern district of New York:

The libel and complaint of Oliver Moses, Charles Owen, Galen Clapp, Frank O. More, Galen C. Moore, and Albert Otis, owners of the ship "Robert Cushman," ag'st James R. Boyd, John L. Boyd, jr., and Edward H. Hincken, of the city of New York, in a cause of contract, civil and maritime, alleges as follows:

First. That heretofore, and on or about the 24th day of July, in the year 1862, the said ship Robert Cushman being then in the port of New York, the said libellants, by their agent in that behalf duly authorized, made and concluded with the respondents a charter-party, bearing date the day and year last aforesaid, by which the libellants, for and in consideration of the covenants and agreements therein contained, to be kept and performed by the respondents, covenanted and agreed to the freighting and chartering of the whole of the said ship or vesssel, (with the exception of the deck,
4 cabins, and necessary room for the crew and stowage of provisions, sails and cables), or sufficient room for the cargo therein

mentioned unto the respondents, for a voyage from the port of New York to Havre, in the terms in said charter contained, that is to say, that the said vessel should be tight, staunch, and strong, and every way fitted for the said voyage, and should receive on board during the same the merchandise therein mentioned, and that no goods or merchandise should be laden on board otherwise than from the said respondents or their agent.

And it was agreed, in and by the said charter-party, by and on behalf of the respondents, that they would provide and furnish to the said ship or vessel at New York a cargo of lawful merchandise, to be loaded under inspection, and that they would give sufficient weight to load the said vessel to the draft of water allowed by inspectors of vessels, and that all grains should be laden in the bags of the shippers thereof.

5 And the respondents further agreed, that they would pay for the use of the said ship or vessel during the said voyage the sum of twenty-four cents per bushel of wheat, of sixty pounds for each and every bushel, and a fully equivalent freight for all other merchandise laden on board, together with five per cent. primage, and that such charter money should be payable on the discharge of the cargo at an exchange of 5,25 to the dollar.

And it was further agreed, in and by the said charter-party, that the lay days for loading and discharging should commence from the time the captain of the said vessel reported himself ready to receive or discharge cargo, and be twenty-five running days in New York for loading and dispatch in discharging the cargo, and that for each and every day's detention, by default of the respondents or their agent, one hundred silver dollars per day, day by day, should be paid by the respondents to the libellants.

6 That the cargo or cargoes should be received and delivered alongside of the vessel within reach of her tackles, at ports of loading and discharging. That the ship should go consigned to charterers' friends, paying two per cent. commission, and that the ship should pay brokerage and commission to the respondents, and the said parties bound themselves to the true and faithful performance of the said charter in the penal sum of fifteen thousand dollars, as by the said charter-party, ready to be produced as this court may direct, will at large and more fully appear.

Second. And the libellants further allege, that afterwards, and in or about the month of August, 1862, the said charterers furnished to the said vessel, and the master thereof took and received on board thereof, a cargo of merchandise, and thereupon set sail from the city of New York, and proceeded therewith on the voyage, in the said charter-party mentioned, to the port of Havre, where she duly and safely arrived with the said cargo on board, and there duly delivered the same.

7 Third. That although the libellants have in all things well and truly kept and performed all and singular the covenants and undertakings on their part, in the said charter-party mentioned to be performed and kept; yet the said respondents have not per-

formed and kept the covenant and conditions therein contained on their part to be performed and kept, but have wholly refused and neglected to perform the same.

That upon the discharge of the said cargo at Havre aforesaid, there became, and was due to the libellants, upon the said charter-party, the sum of fourteen thousand seven hundred and ten dollars, and that there is now due and owing to them, for the freight mentioned in said charter, the sum of seventeen hundred and seventy-nine dollars and twenty-seven cents, over and above all payments, offsets, and claims whatsoever, and which became, and was and is due and payable by the respondents to the libellants, according to
8 terms of the said charter-party, and their agreement in that behalf, but which they have refused and still refuse to pay.

Fourth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this honorable court.

Wherefore, the libellants pray that a citation, according to the practice of this court in like cases, may issue against the said respondents, and they be cited to appear and answer upon oath all and singular the matters herein particularly provided and set forth; and that this honorable court would be pleased to decree the payment of the amount so due as aforesaid, with their costs, and that they may have such other and further relief as in law and justice they are entitled to receive.

OWEN, GRAY AND OWEN,
Lib'l't's Proctor.
EDWARD H. OWEN,
Advocate.

9 SOUTHERN DIST. OF NEW YORK, *ss:*

Edward J. Owen being sworn, says, that he is one of the proctors for the libellants in the foregoing libel mentioned. That the said libel is true of his own knowledge, except as to those matters which are therein stated upon information and belief, and as to these matters deponent believes it to be true; that the grounds of deponent's knowledge and belief are derived from the charter-party in the said libel mentioned, which is in deponent's possession, and from information derived from the libellants and their agents in this action. That the libellants are not, nor is either of them within the southern dist. of New York, or within one hundred miles from the place of trial of this action, as deponent has been informed and believes.

EDWARD J. OWEN,

Sworn to before me, Feb'y 12th, 1863.

A. C. WILLMARTH,
Notary Public.

Endorsed: 17–452, U. S. dist. court. Oliver Mosses and al., *vs.* James R. Boyd and al., libel. Owen, Gray and Owen, lib'l't's proctor, 72 Wall st. Filed Feb. 14, 1863.

11 District court of the United States for the southern district of New York.

Filed the 14th day of Feb'y, 1863.

Stipulation for libellant's costs, entered into pursuant to the rules and practice of this court.

Whereas, a libel was filed in this court, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and sixty-three, by Oliver Moses and others, against James R. Boyd, John J. Boyd, jr., and Edward H. Hincken, for the reasons and causes in the said libel mentioned, and praying that process may issue against above-named respondents, and that the court will be pleased to pronounce for the claim of libellants; and the said libellants, and Henry Leeds and Wm. J. Leeds, sureties, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellants or their sureties, execution may issue against their goods, chattels, and lands, for the sum of one hundred dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be; and each of them is, bound in the sum of one hundred dollars, conditioned that the libellants above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

OLIVER MOSES AND OTHERS,
Per EDWARD J. OWEN, *Proctor.*
HENRY LEEDS.
WM. J. LEEDS.

Taken and acknowledged, this 14th day of February, 1863, before me.

GEO. W. MORTON,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Leeds and Wm. J. Leeds, parties to the above stipulation, being duly sworn, doth each depose and say, that he resides in the city of New York, and that he is worth the sum of two hundred dollars, over and above all his just debts and liabilities.

HENRY LEEDS.
WM. J. LEEDS.

Sworn to, this 14th day of February, 1863, before me.

GEO. W. MORTON,
U. S. Commissioner.

Recorded the fourteenth day of February, 1863.

GEO. F. BETTS, *Clerk.*

12

13 The President of the United States of America to the marshal of the southern district of New York, greeting:

[SEAL.] Whereas, a libel has been filed in the district court of the United States of America for the southern district of New York, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and sixty-three, by Oliver Moses, *et al*, against James R. Boyd, John J. Boyd, jr., and Edward H. Hincken, in a certain action, civil-maritime, for balance due on charter-party, therein alleged to be due to the said libellants, amounting to seventeen hundred and seventy-nine 20-100 dollars, and praying that a citation may issue against the said respondents pursuant to the rules and practice of this court.

Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you cite and admonish the said respondents, if they shall be found in your district, that they be and appear before the said district court on the seventeenth day of February, at the city hall, in the city of New York, then and there to answer the said libel, and to make their allegations in that behalf, and have you then and there this writ, with your return thereon.

Witness, the Honorable Samuel R. Betts, judge of said court, this fourteenth day of February, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-seventh.

GEO. F. BETTS, *Clerk.*

OWEN, GRAY & OWEN,
Proctors, Libellants.

[50 int. rev. process stamp, cancelled.]

14 Endorsed:

Vol. 17, No. 452. United States district court. Oliver Moses, *et al*, *vs*. James R. Boyd, *et al*. Citation. Returnable Feb'y 17th, 1863. Owen, Gray & Owen, proctor for lib. I hereby depute David Dwire to execute the within process. Feb'y 14th, 1863. R. Murray, U. S. marshal.

Filed 17th Feb'y, 1863.

Personally served on James R. Boyd. Others not found. Feb'y 17th, 1863. R. Murray, U. S. marshal.

15 To the Honorable Samuel R. Betts, judge of the district court of the United States for the southern dist. of New York:

The answer of James J. Boyd, John J. Boyd, and Edward Hincken, to the libel and complaint of Oliver Moses, Charles Owen, Galen Clapp, Frank O. More, Galen C. Mosses, and Albert Otis, alleges as follows:

1st. The respondent admits that, on or about the 24th day of July, 1862, they made a written charter-party of the said "Robert Cushman," to which, for the contents thereof, these respondents refer, and they deny all allegations of the libel inconsistent therewith.

2nd. These respondents deny that the said charter-party was duly performed by the said ship, and the master and owners thereof; but, on the contrary, allege that the said vessel was not sound, tight, and staunch; that her decks were not properly caulked, and
16 were leaky; that her hatches were not properly fastened and caulked during said voyage, and that the said vessel was, in other respects, unfit for the transportation of the cargo duly laden on board, by reason whereof the said cargo received serious injury and damage, to an amount exceeding the claim of the libellants.

3d. These respondents, also, allege that the said cargo, laden on board said vessel under said charter-party, was not properly damaged, and not properly stowed and cared for by the persons in charge of said vessel; and that, by reason of improper stowage, a considerable portion of said cargo was greatly injured and damaged, and the same not duly delivered, as required by the contract.

4th. These respondents further allege that the cargo, laden on board said vessel, was consigned to various parties in Havre,
17 and that bills of lading therefore were executed by the said master, according to which the freight on such cargo was to be paid. That said bills of lading were received and retained by the master and owners of said vessel; and by virtue thereof the amount of freight on said cargo collected and received by the said master and owners, or their agents in Havre, as these respondents believe, and the same amounted to sufficient to discharge the whole amount agreed to be paid by the said charter-party for the charter and hire of said vessel, and the amount stipulated by said charter-party to be paid has been paid, and satisfied by reason of the premises, and no sum whatever is due the libellants upon said charter-party.

Wherefore, the respondents pray that this honorable court would be pleased to pronounce against the said libellants, and dismiss the said libel, with costs to be taxed.

EDW'D HINCKEN.

Sworn to before me, this 27th day of April, 1663.

WM. D. JONES,
Notary Public, 74 *Wall st.*

18 BENEDICT, BUN & BENEDICT,
Pr. for Resp'd'ts.

Endorsed:

17,452. U. S. dist. court. Jos. R. Boyd, *et al*, ads. Oliver Moses *et al*. Answer. Benedict, Bun & Benedict, pr. resp'd'ts, 74 Wall st. Filed 5th May, 1863.

19 At a stated term of the district court of the United States of America, for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Friday, the 16th day of June, in the year of our Lord one thousand eight hundred and sixty-five.

Present: The honorable Samuel R. Betts, district judge.

OLIVER MOSES, *et al*,
vs.
JAMES R. BOYD, *et al.* } 17,452.

This cause being called in its order on the calendar, ordered hearing. Pleadings read.

Evidence for libellants:
Deposition of Wm. M. Otis read.
Deposition of Albert C. Otis read.
Deposition of James Lincoln read.
Deposition of J. M. Le Tellier read.
Cause adj'd to 19th inst., at 11 a. m.
June 19th. Cause cont'd.
John B. Phillips, sworn.
Cause suspended to await motion to amend pleadings.

THURSDAY, *December* 21, 1865.

This cause being called in its order on the calendar, ordered continuation.
Pleadings read.
Evidence for libellants:
Deposition of William M. Otis read.
Letter of charterers read.
Deposition of Albert C. Otis read.
Supplementary deposition of Albert C. Otis read.
Evidence for respondents:
Samuel Harding, sworn.
James Funck, sworn.
George M. Sampson, sworn.
Edward Haineken, sworn.
Evidence for libellants:
John B. Phillips, sworn.
Evidence for respondents:
Deposition of Thomas Stetson read.
Deposition of William T. Kelly read.
Deposition of Theodore Mousset read.
Deposition of John F. Wanner read.
Evidence for libellants:
Deposition of Joseph M. Le Tellier read.
Deposition of James Lincoln read.
Evidence for respondents:
Henry Simpson, sworn.
Cause adj'd to 11 a. m. to-morrow.

FRIDAY, *ec. 22d*, 1865.

Cause continued.
Mr. E. C. Benedict argues for respondents.
Mr. S. P. Nash argues for libellants.

C. A. V.

21 United States district court, southern district of New York.

OLIVER MOSES, *et als*,
vs.
JAMES R. BOYD, *et als*. } Dec'r 21, 1865.

Before Hon. Judge Betts.
For libellants, Mr. Owen and Mr. S. P. Nash.
For respondents, Benedict Bun & Benedict.
Samuel Harding; James Funck; George N. Sampson; James Funck, recalled; Edward Hincken; John B. Phillips; Henry Simpson.

WARBURTON & UNDERHILL,
22 *Stenographers*, 117 *Nassau St.*

23 Mr. Owen reads the libel.
Mr. Benedict reads the answer.
Counsel for libellants reads in evidence.
Deposition of William M. Otis.
Mr. Benedict objects to proving the special undertaking stated by this witness, on the ground that it is not set up in the libel.
Testimony admitted; Mr. Benedict excepts.
Counsel for libellants also reads in evidence.
Deposition of Albert C. Otis.
(It is conceded that the 68 bags named were improperly stowed and they are allowed for.)
Counsel also reads in evidence the supplementary deposition of the same witness.
Libellants rest.

Samuel Harding, called by the claimants, being duly sworn, was examined by Mr. Benedict.
Q. What function do you hold here?
A. At present I am surveyor for the Bureau Veritas of Paris.
Q. That is the French Lloyd's?
A. Yes, sir; I am one of their surveyors for the classification of ships.
Q. Have you had any experience as shipmaster?
A. I was shipmaster for 30 years; from 1830 to 1862.
24 Q. Have you ever sailed between here and Havre?
A. I have sailed from Havre to New York, but not from New York to Havre.
Q. Is a vessel considered seaworthy that has not her decks caulked?
(Counsel for libellants objects to any testimony about the seaworthiness of the vessel.)
A. No, sir; a vessel whose decks had not been caulked is not seaworthy, of course.
Q. The between decks should be caulked?
A. I have had command of several new ships, and the between decks have always been caulked when the ship was new; they ought always to be caulked one year afterwards, positively; after that, from

time to time, as required. I always kept my between decks perfectly tight. I considered it necessary, not only for the preservation of the cargo underneath, but also for the strengthening and stiffening of the ship.

Q. Did you examine this ship?

A. No, sir; I have no knowledge of this ship at all.

Cross-examined by Mr. Nash:

Q. I understand you to say that in new vessels, the between decks are always caulked as a matter of course?

A. Yes, sir.

Q. And how often are they recaulked?

A. A new ship ought, in my opinion, to have her between decks caulked at the end of the first year.

25 Q. But after that she would not need it again for some time?

A. In ordinary cases, it might be for 2, 4, or 6 years, according to the cargo she had in; if she had some very heating cargoes in she would require to be caulked oftener; but that is my usual experience, that the between decks ought to be caulked after the first year, and after that as often as they became open.

Q. How often the between decks should be caulked depends somewhat on the character of the cargo she is in the habit of carrying?

A. A very heating cargo would open the between decks always. After landing a cargo of tobacco, the between decks require caulking; that goes through a sweating stage.

Q. Do you find any prevalent general usage in relation to the caulking of ships?

A. No, sir, it depends on the condition of a ship. I think one of the conditions of a ship is, that the between decks should be always tight.

Q. Is grain a heating cargo in the summer time?

A. I should not suppose grain to be a heating cargo, unless damaged in some way, and then it becomes very much heated.

Q. The question of the seaworthiness of a vessel applies to the outer decks?

A. The seaworthiness of a vessel applies to the outer decks.

Redirect:

26 Q. You mean too, by that, that if the between decks are not tight she is seaworthy?

A. Yes, sir, to go to sea.

Q. Whether the between decks are open or not?

A. Yes, sir, the question of damaging the cargo is another point entirely.

James Funck, called by the claimants, and being duly sworn was examined by Mr. Benedict:

Q. Have you some experience as a shipmaster?

A. A little; I have been to sea about 55 or 56 years.

Q. Have you ever been in the Havre trade?

A. Yes, sir; 40 years.

Q. You have been in command of packets many years?

A. I have commanded packets 40 years.

Q. State whether there is any custom or usage that requires you not to carry grain in that trade.

A. No, sir; for these last 10 years, I have generally carried grain.

Q. What part of the ship do you carry grain in?

A. Generally down in the lower hold, and between decks, and all over the ship.

Q. Do you carry lard and oil on these voyages?

A. Lard and tallow, but not oil.

Q. Do you carry them in the same ship with the grain?

A. Yes, sir.

Q. If properly stowed, and the decks are tight between decks, is it safe?

Yes, sir; if the between decks are tight there is no danger
27 in carrying lard, or alcohol, or anything else between decks.

Q. What do you say about its being necessary in those ships to have the between decks tight?

A. They ought to be tight, of course, in taking in cargo. I never looked upon a ship as fit to take in cargo, unless the between decks are tight?

Q. Have you carried lard thus between decks?

A. Yes, sir; very often.

Q. By the court. Does the decking require any special adaptation for that species of cargo, different from other cargoes?

A. It requires to be tight, of course, or the lard would leak through.

Q. Do you make any particular difference—put in any extra deck?

A. Not at all; I always made it a practice to keep the ship in order to carry cargo.

Q. It only requires the between decks to be tight.

A. That is all.

Cross-examined by Mr. Nash:

Q. Have you carried lard in the summer time?

A. Yes, sir; all times of the year.

Q. It is very apt to leak in hot weather.

A. Lard is, of course.

Q. It leaks out of the casks.

A. Yes, sir.

Q. No matter how tight the casks are, they are very apt to leak.

A. In very hot weather, they are apt to leak.

28 Q. In mid-summer there would be some risk in putting lard on the top of a dry cargo.

A. Not if the between decks were tight; I never made any difference; I always stuck the lard between decks.

Q. Suppose the lard all runs out; what becomes of it?

A. It runs between decks. I have seen lard in a ship, an inch deep between decks.

Q. You have seen it an inch deep when the casks were put on board tight.

A. Yes, sir; but some part of that was in consequence of not being stowed as it should be, and it got stoved.

Q. Did you ever see lard that came on board cold leak in that way—after it came on board cold, and heated afterwards?

A. I do not recollect any case of that sort.

George N. Sampson, called by the claimants, being duly sworn, was examined by Mr. Benedict:

Q. You have some experience as shipmaster.

A. Yes, sir.

Q. In the Havre trade?

A. Yes, sir.

Q. How much experience—how long have you been to sea?

A. 37 years.

29 Q. Did you ever carry lard?

A. Yes, sir.

Q. Did you ever carry grain?

A. Yes, sir.

Q. Is it common to carry lard and grain on the same ship?

A. Yes, sir.

Q. Where do you put the grain generally?

A. In the lower hold; if you have any left, it is put between decks, or all over.

Q. Where do you put the lard?

A. Between decks or in the lower hold; if we put grain in the middle, we put the lard in the end, and in the lower hold, and then between decks.

Q. Any danger in carrying it there, if the ship's decks are tight?

A. I do not consider there is any danger whatever, if the ship's decks are tight, in carrying lard between decks. I have had on one voyage very bad weather, (not in a warm season,) when 500 barrels were entirely smashed in pieces between decks; we had the lower hold pretty full of grain then, and I do not know that we paid one dollar damage.

Q. Your between decks were tight?

A. Perfectly tight.

Q. Do you think they ought to be tight?

A. They should be tight, they ought always to be tight, but most surely when you take lard as a cargo; no matter whether

30 there is grain in or not. We often carry lard from New Orleans in the summer time, when it leaks so that if the ship makes any water you see a stream of lard behind; we have scuppers between decks, and if it leaks it runs down into the bottom of the ship.

Q. Ought the between decks to be caulked, so that they would not leak water through?

A. Certainly, if you have liquor of any kind, and if it leaks

between decks, and the between decks are not tight, it must go through the planks, and on to the cargo below.

Q. Is it common to carry lard between decks?

A. Oh, yes, sir.

Cross-examined by Mr. Nash :

Q. This case, that you spoke of, where you had so many casks stove in, was the lard fluid then in oil?

A. No, sir; some of it, not much.

Q. But in mid-summer, in very hot weather, lard will leak out of the casks and run over the deck?

A. Yes, sir; I have taken lard in New Orleans in the summer time, when, perhaps, the casks were two thirds full, and by the time we got across there would be only one-half; but we pumped it out—it does not remain in the ship.

Q. You pump it out of the ship?

A. Yes, sir.

31 Q. Lard is penetrating when fluid?

A. Yes, sir; it becomes like oil, goes into oil, but lard would not penetrate through a two and a half-inch plank in going from here to Havre; it goes into the wood of course. I do not know that you could put enough on to penetrate the wood.

Re-direct :

Q. Do you think that lard would destroy the oakum in a ship in one voyage?

A. No, sir; the decks are always pitched when they are caulked, and the pitch would prevent the lard destroying the oakum in one voyage; it probably might in 6 months time if the vessel worked much and caused the ship to break up, so that the oakum would get lose and the lard would get in; but I cannot imagine that it would destroy it in a voyage.

James Funck, (recalled :)

Q. Do you think that lard would destroy the oakum or kill it in one voyage?

A. No, sir; it would carry several voyages without doing it.

Q. What do you say about the necessity of overhauling between decks, and examining as to the caulking?

A. I always examine every voyage, and if they require caulking, I caulk them; before I commence taking in cargo, I examine every part of the ship.

32 Cross-examined :

Q You do not mean to say that you caulk your between decks every voyage?

A. No, sir; if they need caulking I caulk them.

Edward Hincken, called by the claimants, being duly sworn, examined by Mr. Benedict:

Q. Are you one of the firm of Boyd & Hincken?

A. Yes, sir.

Q. Had your house any experience in the Havre trade?

A. I have been in the house 30 years, and it has been all the time in the Havre trade.

Q. Had you charge of a line of packets?

A. Yes, sir.

Q. State whether it is common in that trade to carry lard and grain in the same ship.

A. It has been our custom to carry lard and grain in the same ship, and even alcohol.

Q. Where do you stow it?

A. If possible, we stow the alcohol in the lower hold, but we have carried it repeatedly between decks. The lard being lighter than grain, we put the lard between decks, and the grain in the lower hold.

Q. Should the between decks be tight?

A. We always consider it necessary to have our between decks tight.

Q. Water tight and oil tight?

A. Tight for any liquid.

Q. Was there an objection made by the captain to carry
33 this lard between decks?

A. There was an objection made. Mr. Nesbitt came and told me that the captain objected. I told him there was no danger in carrying lard between decks.

Counsel for the libellants object to any parol evidence in relation to the letter; counsel for the claimants proposes to show that the captain refused to carry the lard between decks; that Mr. Hincken said it was as safe to carry lard between decks as anything else, and that it should go there; that they then required him to give them a guanty to hold them harmless, and proposed to follow that by proof; that they knew their decks leaked, and did not tell Mr. Hincken that when the guaranty was signed; it was signed on the understanding that the decks were tight; counsel for the libellants further object that there is nothing of that kind in the answer—nothing of any misrepresentations as to the condition of the vessel.

(Evidence admitted subject objection.)

Q. Was your direction to carry the oil between decks?

A. Mr. Nesbitt, and I think Captain Otis, came to me and objected to taking the oil between decks. I said there was no objection to
34 taking it there; that all our ships carried it there, and he should too. I said that I would guarantee taking it there. Mr. Nesbitt drew up a guarantee which I signed.

Q. Was anything said about the between decks being tight?

A. There was nothing said about it at that time—nothing about the qualities of the ship; they merely objected to taking the lard, and I said there was no objection; and, after a very brief conversation,

I said I would guarantee. Mr. Nesbitt wrote a guarantee, and I signed it. It was all done in a very short time.

(Paper produced.)

That is the guaranty, and that is my signature.)

Q. Whose is the handwriting of that guaranty?

A. Mr. Henry Nesbitt's.

Q. Did you have any talk with the captain about the ship after that?

A. When the ship was nearly loaded, and the between decks very nearly full, I went down on board one morning, and I noticed the stowage was bad between the decks, and I called Captain Otis' attention to it. He was stowing the grain in the after part of the ship against tallow and against lard. I objected to that stowage, and he promised me that it should be remedied. I was very angry when I first went on board, finding they had my guaranty, and supposing they were abusing it.

(Objected to.)

Q. Did you say anything about that?

35 A. I did; I told him he had my guaranty against the stowage of the lard, and he was stowing it badly, and I would not be responsible under my guaranty. He promised me the stowage would be remedied. We parted very good friends, and went on to the deck talking about the ship getting away. He told me then that he would not have exacted a guaranty from me if his between decks had been caulked; that his between decks were open, and that was the reason he exacted the guaranty from me; that was the first I knew that the between decks had not been caulked.

Q. You have had long experience as a merchant. I want to know the signification of this phrase in the charter-party: "Ship to go consigned to charterer's friends, paying 2 per cent. commission."

(Objected to. Admitted subject to objection.)

A. That is well understood in commerce; it means that the agent of the ship on the other side should be such and such a man.

Q. The charterer's friend?

A. Yes, sir.

Q. Not necessarily his agent, but his friend?

A. Yes, sir.

Cross-examined by Mr. Nash:

Q. There was a surplus of freight money over and above the charter money?

A. Yes, sir; I think there was.

36 Q. Who received it?

A. We were credited for a certain amount.

Q. Credited by Barbe & Co. in general account?

A. Yes, sir; the figures I do not recollect.

Q. They were regular correspondents of yours?

A. Yes, sir; we corresponded with them.

Q. How long did they occupy that relation?

A. Two or three years.

Q. The account current between you and them embraced many other vessels besides this?

A. No, sir; they sent us an account for that particular ship.

Q. They had accounts of other ships for you?

A. I cannot recollect any other ship they had about that time?

Q. Was Mr. Mousset a partner?

A. He was a partner of Barbe.

Q. What interest have Barbe & Co. in this consignment?

A. Nothing but their commissions.

Q. Do they not share the commissions with your house in general account?

A. No, sir.

Q. Do they consign vessels to you in charters made from there?

A. Their successors, the present house, do.

Q. In making charters you desire to have vessels sent to them, and they reciprocate to you?

A. Where we can contract we do. I keep the control of the ship so as to get freights. I try and get consignments, because
37 some one, for the sake of the consignment, will give a higher rate of freight. When I can retain the *the* consignment, I do, and send it round to my old friends.

Q. You keep control of the ships wherever practicable for the purpose of controlling the consignment?

A. Yes, sir.

Q. That led to the insertion of the clause in the charter-party, that the vessel should be consigned to your friends?

A. Yes, sir.

Claimant's rest.

John B. Phillips, called by the libellant, being duly sworn, was examined by Mr. Nash.

Q. You are a stevedore?

A. Yes, sir.

Q. How long have you been such?

A. Between 19 and 20 years.

Q. Did you stow the cargo of the "Robert Cushman," in the summer of 1862?

A. I did. I directed it to be stowed.

Q. How did you begin first?

A. As near as I can remember, what came first was grain of some kind; that was put in the hold in order to ballast the vessel; it was stowed down in the grain bin, and mats spread over it, and bags put over the mats; it was stowed, I think, until the hold was nearly full, at the same time when we getting the grain in some tallow
38 was brought, but not being prepared to take in the tallow, I took in the grain. I took the tallow and put it in after grain bin. I put a partition up to the forward part of the aft hatch; there was one or two bins, and there might be three, abaft the foremast. I took my tallow at first and stowed it forward of the bin in the hold. I stowed all as it came along.

Q. When you got your lower hold full was there any other lard brought to be put on the vessel?

A. When I got the lower hold full there was nothing else come down but lard *lard*.

Q. What was the condition of that lard as it came to the vessel?

A. That lard, before it was ready to be taken in, was more oil than lard.

Q. What was the state of the weather?

A. It was extremely hot. I had to get two men to relieve each other on deck every half hour, it was so tremendous hot; and some days it was so hot that they had to lie still. It was in August.

Q. Where was the lard that came in that way placed?

A. It was put down below until the lower hold was full, and afterwards it was put on deck. I did not put it between decks without the permission of the captain. I did not think it right, and
39 would not assume the responsibility of putting it there. I never do put liquid between decks, without permission of the captain, then I am not responsible. I stow any liquid, of any description, between decks, and assume the responsibility. I told the captain that I did not think it right; but if he said it was right, I would do so, but I would not assume the responsibility.

(Claimant's counsel objects to any conversation with the captain.)

Q. What was afterwards received was placed between decks?

A. The captain told me to do so, and I stowed it between decks; there was a certain quantity of grain, which did not go in the hold, which was put between decks, in the centre of the vessel. I closed my main hatch before the other.

Q. How was the stowage; good or bad?

A. I consider the stowage very good indeed—as good as I could make it. I put up a petition with loose staves between the grain and the barrels; the captain saw it; he knew I was doing the best I could; likewise mats in the centre of the ship.

Q. Was there any objection made to you, while stowing the cargo between decks, or elsewhere, as to the manner in which you were stowing it?

A. Not to my knowledge. I was not there all the time.

Q. Nothing came to you?

40 A. No, sir.

Q. As you had this long experience in stowing cargo, I will ask: is it usual or customary to put lard or liquids between decks when there is grain or a dry cargo below; take lard, for instance, in going to Havre?

A. I would not put it there, knowing it is not safe; it is not customary. I don't think the port warden would give a certificate that it was properly stowed if there were any other goods underneath which would derive damage.

(Claimant's counsel object.)

Cross-examined by Mr, Benedict:

Q. Was there any scuppers to the between decks?

A. Yes, sir.

Q. Did you stow the whole cargo?
A. It was stowed under my direction.
Q. About how long were you stowing it?
A. I do not exactly remember; but I think not far from between 2 and 3 weeks; it might be a little less or a little over.
Q. What is the use of these scuppers between decks?
A. These scuppers between decks are used for the purpose of washing between decks.
Q. They carry off water or anything else from between decks?
A. Yes, sir; two little scuppers; they do not amount to anything.
Q. They are enough to keep the between decks dry?
41 A. Not if they get overflooded; they are merely to drain it; I never saw one exceeding six inches in circumference.
Q. Did you ever stow lard between decks before?
A. I have no recollection; I do not know but I have done it in the winter time. I have done it to Liverpool in the winter time.
Q. But you do not recollect doing it at any other time?
A. I did not do it at any other time without permission.
Q. Did you do it at all?
A. Not in the summer, without some one was responsible.
Q. Did you ever do it?
A. Not to my knowledge; unless it might be lard in tins; put up in sealed tins; that could go anywhere.
Q. Did you stow beef or pork between decks?
A. I do not know that I ever did.
Q. Beef and pork sometimes leak?
A. Yes, sir.
Q. Did you ever stow alcohol between decks?
A. No, sir; not that I know of; I always was against it.
2. Did you ever stow the ship "Superior" for Mr. Nesbitt?
A. No, sir.

Counsel for claimants reads in evidence:
Deposition of Thos. T. Stetson.
42 Deposition of Wm. T. Kelly.
Deposition of Theodore Mousset.
Deposition of John F. Warner.

Counsel for libellants reads in rebuttal:
Deposition of Joseph M. Le Tellier, and
Deposition of James Lincoln.

Henry Simpson, called by the claimants, being duly sworn, examined by Mr. Benedict.
Q. Are you a stevedore?
A. Yes, sir.
Q. Have you had much experience as a stevedore?
A. I have only been at it 41 years.
Q. Did you ever stow lard and wheat in the same vessel?
A. Lard and grain frequently; I used to be at work at it all the time.

Q. Is it common to stow wheat and lard in the same ship?

A. Yes; I stow wheat chiefly in the lower hold; and the lard between decks; I have loaded 500 or 600 ships with lard between decks, and grain in the lower hold.

Q. Should the between decks be tight?

A. I do not call a ship seaworthy unless the between decks are tight.

Q. If the between decks are tight will lard leak through?

43 A. I never have known it.

Q. Does this practice prevail of putting wheat and lard in the same ship in that way?

A. I have always seen it that way. I never saw it otherwise. Sometimes a ship is loaded with wheat altogether, but where both cargoes are put on we calculate that the lard is the lightest, and we put it between decks, and the wheat below to make ballast.

Cross-examined by Mr. Nash:

Q. It does not make any difference where the vessel is going, or what the weather is?

A. I speak of going to Europe.

Q. Does it make any difference whether it is mid-summer or winter?

A. I always stowed them that way; never made any difference; I have even stowed lard oil in that way.

Q. And you would stow alcohol and fluid between decks?

A. Yes, sir.

Q. And dry cargo below?

A. Certainly, as long as the dry cargo is the heaviest.

Q. That is your theory of stowing.

A. Yes, sir.

Q. Do you stow ships for Boyd & Hincken?

A. Yes, sir.

Q. Do you discharge vessels as well as stow them?

A. A stevedore discharges as well as stows vessels. I have been at it for 40 years.

44 Endorsed:

U. S. dist. court. In admiralty. Oliver Moses, *et al*, *vs*. Boyd & Hincken. Stenographers' notes furnished by Owen, Gray & Owen.

45 U. S. district court.

OLIVER MOSES, *et al*, }
vs.
JAMES R. BOYD, &c. }

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William M. Otis, a witness produced and examined, de bene esse, on the part of the libellants in the above-entitled action, being duly sworn, deposes and says: I am upwards of fifty years old; I am master of the barque Andaman now lying in this port and bound for Fortress Monroe, and expect to sail in her on a foreign voyage in a few days,

and cannot state how soon I may return. I live in Brunswick, Maine. I have been master and commander of vessels for upwards of twenty-five years past. I know the ship Robert Cushman. I went from here in the summer of 1862, to Boston, and there attended to discharging her inward cargo, and then brought her around to this port of New York, where I chartered her to Boyd & Hincken, merchants of this city, for a voyage from here to Havre. The charter is dated 24th July, 1862. This is the charter-party. It is signed by me on behalf of the ship, and by Boyd & Hincken, and is now marked R. D. B.

I attended to the loading of the vessel under this charter-party. The cargo consisted of grain, lard, tallow, some copper and
46 some cocoa, black walnut, and some other stuff. The grain was put in the bin in the lower hold; as the cargo came along it was stowed in the lower hold. The lard was stowed in the end; I know of a quantity of lard, which was brought to the ship which I refused to receive. The lower hold was at that time full, and there was no place for it there. I knew that the vessel was to receive lard, and she had already taken all that came before that into her lower hold.

Ques. Why did you refuse to receive the lard, which was last offered?

Ans. I did not consider it safe stowage to put it in the between decks.

Ques. Why?

Ans. Because it is not usual to stow lard oil or such things in the between decks when there is a cargo of grain below.

Ques. Would such stowage of lard between decks, with grain below, be good stowage?

Ans. I should say not. To stow lard between decks in hot weather it would tend to go through the decks. The barrels themselves will shrink and leak considerable in hot weather.

Ques. Would the between decks of a vessel be sufficiently secure to prevent the lard from leaking through if it came out of the barrels?

Ans. I should say they would not. It would leak through the decks of any vessel. The lard would kill the pitch which is
47 in the seams. It would saturate the oakum and make it look dead, and with grain and heat below it would be likely to make the oakum come out.

Ques. When you refused to receive such lard and stow it between decks, what arrangement, if any, was made in reference thereto with Boyd & Hincken?

(Objected to.)

Ans. Mr. Hincken gave me a letter. This letter was dated in the forepart of August, somewhere about the 6th or 7th of August, 1862. I gave the letter to my brother, who went in the ship on that voyage; I have not seen it since. I remember the purport of it. The paper shown to me I think is a copy of it, and the same is marked R. D. B. After that letter was received we commenced to take in the lard, which was stowed in the between decks forward and aft. I

observed the condition of this lard as it lay on the wharf, before it was taken aboard. It was more like oil than it was like lard, a good deal of it. It had leaked out a good deal. The weather at the time the vessel was taking in the cargo was very hot; it was so excessively hot that some days the men could not work. There were several days that they could not work in the middle of the day. The lard was taken aboard as fast as it could be after it came to the
48 ship. There was some which lay over night upon the dock before it could be taken aboard. The lower deck hatches were all caulked and secured before the vessel sailed. A cargo of grain in bulk in the lower hold is apt to produce heat, and that would tend to shrink the between decks.

Ques. Did you have any considerable talk with Boyd & Hincken about taking this lard, before you received the letter above mentioned? And if so, state what it was.

Ans. I had a considerable talk with Mr. Hincken. I objected to taking the lard between decks, because it would be bad stowage, and so make the ship liable in case of damage. I told him I would not take it unless he would give me an agreement to hold the ship harmless, and that was the reason he gave that letter.

Ques. Would you have taken the lard in the between decks if he had not given you such agreement?

(Objected to.)

Ans. I should not.

Cross-examined:

I have been almost over all the trade. I never have run between here and Havre at all. I have run between New Orleans and Mobile and Havre. I have carried lard from New Orleans to Mar-
seilles in the winter time, and have brought it from New
49 Orleans here.

I don't remember ever having carried lard in the between decks of a ship before this voyage of the Robert Cushman.

I knew the Robert Cushman when she was built; she was two and half or three years old at this time.

I had not had charge of her before I took charge of her this time, at Boston.

Q. Did you ever know of a case before in which lard rotted the oakum in the seams of a vessel, and made it come out?

A. I don't know of any such particular case, because I have not seen it or been where it was. But I know that oil tends to kill oakum.

Q. How do you know that?

A. I know it because if you put oil on rigging, it will rot it; the outside yarns will rot and break.

Q. Do you know anything of your own knowledge as to the time in which it will do this?

A. It will do it in a very short time.

I gave that letter to my brother, Albert C. Otis; he was one of the owners; I was not. I did not go in the ship; I gave up the command

to him when the ship was loaded. Mr. J. B. Phillips was the stevedore we had to load the ship.

The lard that I speak of as lying on the dock over night, was some that came down so late that we had not time to get it aboard.

50 It was very hot weather while we were stowing both the lower hold and the between decks. We began to load in a day or two after the charter was signed. I should think the vessel carried very near two-fifths of her cargo between decks. The cargo was pretty much the same in the hold and the between decks, but more grain in the hold.

The heat in the hold arises when the grain begins to spoil, and sometimes when it don't.

There was no objection to the manner in which the cargo between decks was stowed; but I objected to taking the lard there at all.

I don't know anything about the caulking of the between decks before. The between decks were in good condition; I examined them.

Redirect:

The between decks were in fit condition to carry thereon any cargo which ought to be carried over dry cargo below. Mr. Hincken was around the ship during the time we were taking the cargo aboard. Neither he nor any one requested me to keep the lower hold open for this lard. I asked him where to stow the cargo when it came. I have been accustomed to carry lard. It always will leak in hot weather, and I knew the character of lard as cargo at the time I was taking this aboard. Before the vessel sailed Mr. Hincken and

51 I agreed on the amount payable under the charter, and signed a memorandum to that effect upon the back of the charter before mentioned.

Recross:

I should say that any cargo that was liquid was not fit to be carried over dry cargo below.

The between-decks were fit to carry liquid cargo in the between decks, if there was no dry cargo below.

If there was dry cargo below, they were not fit to carry liquid cargo or lard, and no ship is fit to carry such under such circumstances.

I don't know that the lower hold was full when the letter was signed. Mr. Hincken had told me that he was going to send down lard to go in the between decks, and I objected to putting it there.

WM. M. OTIS.

Sworn before me this 14th May, 1865.

[SEAL.] JNO. T. McGOWAN,
Notary Public, New York.

52

53 *R. D. B., March* 13, 1865.—*Nesmith & Sons, No.* 28 *South street, New York.*

This charter-party, made and concluded upon in the city of New York, the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and sixty-two, between Wm. M. Otis, agent for the owners of the ship Robert Cushman, of Bath, Me., of the burthen of tons, or thereabouts, register measurement, now lying in the harbor of New York, of the first part, and Mess. Boyd & Hincken, merchants, of New York, of the second part, witnesseth:

That the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of the deck, cabin, and necessary room for the crew and stowage of provisions, sails, and cables,) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from New York to Havre, France, on the terms following:

The said vessel shall be tight, staunch, strong, and every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from the said party of the second part, or their agent. The said party of the
54 second part doth engage to provide and furnish to the said vessel, at New York, a cargo of lawful merchandise, ship to load under inspection; charterers to give cargo of sufficient weight to load her to the draft of water allowed by inspectors; grain to be in the shippers' bags; and to pay the said party of the first part or agent, for the use of said vessel during the voyage aforesaid, twenty-four cents per bushel of wheat, 60 lbs. for each and every bushel, and other merchandise at a fully equivalent freight—all with five per cent. primage, payable on discharge of cargo, at exchange of 5.25 to the dollar.

It is agreed that the lay days for loading and discharging shall be as follows, commencing from the time the captain reports himself ready to receive or discharge cargo: Twenty-five running days in New York for loading, dispatch discharging; and that for each and every day's detention by default of said party of second part, or agent, one hundred silver dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent; the cargo or cargoes to be received and delivered alongside the vessel within reach of her tackles at ports of loading and discharging.

Ship to go consigned to charterers' friends, paying 2 per
55 cent. commission; ship to pay brokerages and $1\frac{1}{4}$ per cent. commission to Boyd & Hincken.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other, in the penal sum of fifteen thousand dollars.

In witness whereof, we hereunto set our hands, the day and year first above written.

WM. M. OTIS.
BOYD & HINCKEN.

Signed in the presence of—
WM. J. LEEDS.

Endorsement.

The amount to be paid on this charter party is hereby fixed at ($14,710), say fourteen thousand seven hundred and ten dollars in full for the rates therein specified.

BOYD & HINCKEN.
WM. M. OTIS.

New York, Aug't 16th, 1862.

56

57 (Copy.) R D B, M'ch 13, 1865.

NEW YORK, *Aug't 7th*, 1862.

Capt. Otis, ship Robert Cushman:

DEAR SIR: We understand that you object to our shipping lard in the between decks of your ship. We ask you to have all the lard received, and we hereby agree to pay any damages that yourself or the ship may be subject to, on the discharge of the cargo at Havre. The said damage arising from the lard being stowed in the between decks and running on to other cargo, either in the between decks or lower hold.

Yours, truly,
(Sg.) BOYD & HINCKEN.

Endorsed: U. S. district court: Oliver Moses, *et al*, *vs.* James R. Boyd, and al. Deposition of Wm. M. Otis on part of libellants. Owen, Gray & Owen, proc. for lib'ts.

58

59 (Copy.)

Nesmith & Sons, No. 28 South street, New York:

This charter-party, made and concluded upon in the city of New York, the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and sixty-two, between Wm. M. Otis, agent for owners of the ship Rob't Cushman, of Bath, Me., of the burthen of 939 tons, or thereabouts, register measurement, now lying in the harbor of New York, of the first part, and Mess. Boyd & Hincken, merchants, of New York, of the second part, witnesseth: that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of the deck cabin and necessary room for the crew and stowage of provisions, sails, and cables,) or sufficient room for the cargo hereinafter mentioned, unto said

party of the second part, for a voyage from New York to Havre, on the terms following:

The said vessel shall be tight, staunch, strong, and every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from the said party of the second part, or , agent. The said
60 party of the second part doth engage to provide and furnish to the said vessel, at New York, a cargo of lawful mdse.; ship to load under inspection; charterers to give sufficient weight to load her to the draft of water allowed by inspectors; grain to be in shipper's bags; and to pay to said party of the first part, or agent, for the use of said vessel, during the voyage aforesaid, twenty-four cents per bushel of wheat, of 60 lbs. for each and every bushel, and other mdse. at a fully equivalent freight, all with five per cent. primage, payable on discharge of cargo, at exchange of 5.25 to the dollar.

It is agreed that the lay days for loading and discharging, shall be as follows: commencing from the time the captain reports himself ready to receive or discharge cargo, twenty-five running days in New York, for loading, dispatch discharging; and that for each and every day's detention, by default of said party of second part, or agent, one hundred silver dollars per day, day by day, shall be paid by said party of the second part, or agent, to said party of the first part, or agent, the cargo or cargoes to be received and delivered alongside the vessel within reach of her tackles, at ports of loading and discharging.

Ship to go consigned to charterer's friends, paying 2 ℔ com's.
61 Ship to pay brokerages and 1¼ ℔ com's to Boyd & Hincken.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other, in the penal sum of fifteen thousand dollars.

In witness whereof, we hereunto set our hands, the day and year first above written.

(Sg.) WM. M. OTIS.
(") BOYD & HINCKEN.

Signed in the presence of—
(Sig'd) HENRY LEEDS.

Endorsed: Charter-party. Ship Rob't Cushman. July 24, 1862.

62

63 NEW YORK, *August 7th*, 1862.

Capt. Otis, ship "Robert Cushman:"

DEAR SIR: We understand that you object to our shipping lard in the between decks of your ship. We ask you to have all the lard received, and we hereby agree to pay any damages that yourself or the ship may be subject to on the discharge of the cargo at Havre.

The said damage arising from the lard being stowed in the between decks and running on the other cargo, either in the between decks or lower hold.

Yours, truly,

BOYD & HINCKEN.

Endorsed: Boyd & Hincken. Agreement. Aug. 7, 1862.

64

65 U. S. district court.

OLIVER MOSES, and als.,
vs.
JAMES R. BOYD, and als.

It is hereby consented that Albert C. Otis be examined, de bene esse, in this cause as a witness on the part of the libellants at the office of Owen, Gray & Owen, proctors for said libellants, No. 72 Wall street, on Saturday, the 18th day of April inst., at 12 o'clock at noon of that day; that the deposition of said witness, when sworn to before a notary public, may be read in evidence on the trial of this cause, with like effect, subject to all legal exceptions, as if it had been regularly taken before a justice of this court under an order issued for that purpose; that the same need not be filed, but may remain in the possession of the libellant's attorneys, a copy being furnished to or allowed to be taken by the respondent's attorneys.

New York, April 17, 1863.

BENEDICT, BUN, AND BENEDICT,
Att'ys for Resp'ts.

66 U. S. district court.

OLIVER MOSES, and others,
vs.
JAMES R. BOYD, and others.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Albert C. Otis, of said district, being duly sworn and examined, de bene esse, as a witness on the part of the libellants, under the stipulation hereto annexed, deposes and says: I am a part owner of the ship Robert Cushman, and one of the libellants in this cause. I reside in the State of Maine, and expect to leave on a foreign voyage in a few days. The libellants, whose names have been read to me, were, and are the owners of the Robert Cushman. I have commanded her for about three years and a half past. She is a little over four years old, and is 939 tons burthen, I mean register. I was master of the vessel on her voyage from this port to Havre, in August, 1862. She sailed from here about the 17th August, in that year, and arrived at Havre about the 23d September thereafter; I can't state the exact day. I did not attend to the loading of the vessel. I was absent from the city at the time. She was nearly loaded when I returned. My brother, Captain William M. Otis, had charge of the

loading. He had, in fact, charge of the ship. He brought her
67 around from Boston, and chartered her to Boyd and Hincken.
The vessel had her lower hold full of cargo, consisting of wheat, in bags, tallow, lard, potash, and some copper and staves. The lard was stowed in the ends of the vessel, with the tallow underneath. I think there were 7,000 bags of wheat in all, the most of which was carried in the hold midship—you may say it was midship. It was carried in our grain bins used on a former voyage. I don't know that it was all carried in the grain bins. She had in her between decks, I think, about 1,000 sacks of wheat, some tallow, lard, grease, cocoa staves, some black walnut. I saw the cargo when broken out at Havre, and know where it was stowed. The lard, grease, and tallow were in the between decks from the main hatch forward, then the staves, and abaft them were the bags of grain. There was no regular bulkhead; the staves just put up between. I don't know precisely how much lard and grease were carried between decks, but it was enough to fill the same with what else was put in. There was lard and grease also abaft the wheat.

The weather during the voyage was, for the first part, warm and mild, the latter part it was cooler. Had no accident on the voyage.
We had the forehatch opened frequently, most every day when
68 the weather would permit. The other hatches were caulked
down. When the forehatches were opened there was a great deal of heat came up; a person could stay in it, but it came up warm, great deal warmer than is usual with other cargo. I thought then, and do still, that the heat was occasioned by the fact that the weather was very warm during the time the cargo was taken in, and from the heat of the grain in the hold. From what we could see in looking down the forehatch the lard appeared to be leaking. I saw three or four hundred barrels of the lard or grease before it was put aboard; it appeared to be very warm, and like oil. I never carried lard or grease on a summer voyage before from the United States. The heat from the grain in the lower hold has a tendency to dry or shrink the between decks.

Upon arrival at Havre I placed the vessel in the hands of J. Barbe & Co.—this was by direction of the charterers. The vessel having been entered, I called a survey. It was ordered by the American consul and held, but I was not present at the time. No part of the cargo had been removed when that survey was held. I did not bring home a copy of that survey. Before I entered my vessel I noted and
extended my protest. It is, by French law, all done at one
69 time. I did not know the exact condition of the cargo at the
time the protest was noted and signed.

The cargo was afterwards discharged. There were 68 bags of wheat between decks, which had received damage on account of having been stowed in contact with the lard there.

There was some of the wheat below damaged and some other wheat between decks, but such damage was then pronounced not to have been from bad stowage, by the regular port warden. When the lard and grease was broken out from between-decks it was very warm, and

had not stiffened up at all, or but very little. It appeared to have leaked considerable. There was considerable grease and oil on the floor between decks, in some places from an inch and half to two inches deep, but not so all over, as the decks were not level. This lard or grease had leaked through upon the grain below, and this was what caused the damage to the grain below. The wheat between decks (except the 68 bags) was damaged by the melted grease or lard running under the staves which were under the wheat, and the heat seemed to dry the oil up through the staves to the bags of wheat which it damaged.

The owners of the cargo had a survey appointed, who came on board and examined the vessel after the cargo was all out.

70 The steps or ladder by which we descend from the between decks into the lower hold were carried on deck during the voyage, and were put down when we began to break out cargo. The steps leading from the upper deck to the between decks were also carried on deck, and not put down until we began to discharge cargo.

The vessel, when she sailed on this voyage, was in good order, tight, staunch, and strong, and well officered and manned. She did not leak on the voyage.

I had with me a copy of the charter. I have it not here, but it is at my house. I saw Boyd and Hincken before I sailed; they gave me a copy of the charter upon which there was an endorsement, signed by them, of the amount payable under the charter on delivery of the cargo. It was $14,710 freight and primage. I think the cargo was all discharged by about the 15th October. I was paid then a portion of the freight and charter, but I don't know exactly what sum without looking at my accounts.

Ques. Would it or not be bad stowage to carry lard and grease in the between decks of a vessel on such a voyage, in such season of the year, with grain in the lower hold beneath?

A. It would be bad stowage.

Q. If you had been here at the time would, or not, you have consented to carry lard and grease there with grain underneath,

71 at the risk of the vessel and owners?

(Objected to.)

A. I would not.

Cross-examined:

I first took charge of the vessel the day we cleared from the custom-house, the 15th of August, I think. The ship's agents on the other side at Havre were J. Barbe. I cannot tell how much grain stowed in the between decks was damaged. There were 68 bags that the ship was responsible for. These 68 were on the forward end of the pile of bags, the great portion of them were. I can't now state where they were stowed. We did not have our between decks caulked, while the vessel was here. They had not been caulked since I had been in the ship. I had been in the ship about three years then when we commenced this voyage. The most damaged

grain was below, in the lower hold. It was scattered over it, the most in the forward part. It was worse on the lower tier than on the upper tier. I had never known our between decks to leak before this. We had never carried liquors on them before. No hatch was open between the between deck and the lower hold, they were closed and caulked and pitched. The fore hatch from the between decks to the lower hold was not caulked. The hatches over
72 the grain were caulked. There were two hatches over the grain, four hatches in all.

There were two bulkheads in the lower hold. I mean the ends of the grain bin which was made of inch or inch and a quarter boards, intended to carry grain in bulk in. I can't say how long the grain bin was. It had a floor, which came, I should think, twelve inches from the skin.

I can't now say how much money I received from Barbe. They remitted some to the owners also.

I employed a stevedore to discharge the cargo in Havre, and he discharged it. I was about the ship, but did not give my personal attention to the discharging,

We were about fifteen or twenty days discharging. The weather was warm part of the time, not very warm.

ALBERT C. OTIS.

Sworn to this 18th day of April, 1863, before me.

WM. D. JONES,
Notary Public, 74 *Wall St.*

Endorsed: U. S. district court. Oliver Moses, *et al*, *vs.* James R. Boyd, *et al.* Deposition of Albert C. Otis, d. b. e., for libellants. Owen, Gray & Owen, libl't's proc's.

73 U. S. district court.

OLIVER MOSES *et als*,
vs.
JAMES R. BOYD, *et als.*

Consent to examine witness, de bene esse.

It is hereby consented that Albert C. Otis be examined, de bene esse, in this cause as a witness on the part of the libellants, at the office of Owen, Gray & Owen, No. 72 Wall street, on Wednesday, the 12th day of July, 1865, at 12 o'clock noon of that day, that the deposition of said witness when sworn to before a commissioner of deeds or a notary public may be read in evidence by either party on the trial, reference and other proceedings in this cause, with the like effect, subject to all exceptions to the competency and admissibility of the testimony, as if the same had been taken before a commissioner of the court under a notice issued for that purpose, that the same need not be filed unless required by ten day's written notice,

but may remain in the possession of the libellant's proct's, a copy thereof being furnished to the respondent's proct's.

Dated New York, July 10, 1865.

BENEDICT BUN & BENEDICT,
Respdt's Proctors, 76 Wall St. New York.

74

75 U. S. district court.

OLIVER MOSES, &c.
vs.
JAMES R. BOYD, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Albert C. Otis, being sworn and examined as a witness on the part of the libellants, deposes and says:

I have already been examined as a witness in this cause. The charter-party annexed to the deposition of William M. Otis, and now shown to me is the one delivered to me by Boyd & Hincken, and which I took with me on the voyage therein described. By the endorsement thereon, signed by Boyd & Hincken, the amount due and payable at Havre was adjusted at $14,710. The freight payable by the bills of lading exceeded that amount due by the charter. I don't know how much, but I think somewhere in the neighborhood of three hundred dollars.

Question. Before you sailed from New York, did you receive any and what directions from the charterers, Boyd & Hincken, as to the consignment of your vessel and the collection of the freight?

Answer. I was instructed by them to consign my vessel, upon arrival at Havre, to J. Barbe & Co., merchants of that city, and I think I signed a letter consigning the vessel to them, which Boyd &
76 Hincken took to send to that house. I am quite sure that I signed such a letter, but I am not positive. It is usual and customary where vessels are chartered as mine was to do so, and I believe it was done in this case. It was understood that Barb & Co. should collect the freight and to enable them to do so I was directed by Boyd & Hincken to hand over to them the bills of lading, which I did upon arrival at Havre.

Ques. Did you collect any portion of the freight called for by the bills of lading or otherwise, payable on the cargo?

Ans. No, sir, I did not. It was all collected by Barb & Co., or their agents.

Ques. Did you receive any portion of the freight?

Ans. I did not. All the money which I received was paid to me by Barb & Co., who collected the freight as already stated.

Ques. In collecting the freight upon the cargo, for whom did Barb & Co. act?

(Objected to.)

Ans. They acted for the charterers. I never required them to account to me for such freight, and they never did account to me therefor.

Ques. Did Boyd & Hincken tell you before you sailed, to whom you should apply for the amount which would become due upon the charter, if so, to whom were you directed by them?

Ans. They told me that J. Barb & Co. would pay the amount due upon the charter.

77 Ques. Did you apply to J. Barb & Co. for the amount? and if so, did you receive the same?

Ans. I did apply to them for the amount due, and I received in the way of sterling bills and in disbursing the ship, all but 21,400 francs, which was due to me upon the charter at the time I sailed from Havre.

A. C. O. Fr. 21,400.

Ques. Before you sailed, did they render you an account of the indebtedness of the ship to them? If so, will you produce the same?

Ans. They did render me such an account, which I now produce, and which is marked A. C. O., July 12, 1865, and this account was continued down by another account, which I produce and annex thereto, and which was sent to me after I left Havre. By these accounts, there remained due to the ship upon the charter, the sum of 10,102 francs which balance has never been paid to me, or to the owners of the vessel, to my knowledge or belief.

Ques. The last account contains these words: "balance left with J. Barb & Co., fr. 10,102;" state whether or not there was any agreement or understanding with them to leave in their hands such balance?

Ans. There was no such agreement; I demanded all my charter money, and they refused to pay more than the sums stated in those accounts; I never consented to their retaining any portion of the

78 charter money; I considered them as the agents of Boyd & Hincken, who were to pay me the amount due by the charter, but which they failed to do; I had left Havre before the last payment of £450 was made; that money did not come to my hands.

Q. What effect will melted lard have upon the seams of a vessel?

Ans. It tends to kill the pitch on the seams and induce the oakum to work out; I think it has a tendency, also, to shrink the decks, especially when there is considerable heat below, making the deck itself hot from that cause.

Ques. In your judgment, will not melted lard penetrate through decks where water will not?

Ans. It would, I think.

Being cross-examined, he says:

I rec'd of Barbe & Co. fifty-three thousand and forty-two francs and seventy-five centimes (frs. 53,042 ^{75};) this was all I rec'd from them at any time; they afterwards remitted frs. 11,347 ^{40}, eleven thousand three hundred and forty-seven francs and forty centimes; I mean to be understood as testifying that I demanded of Barbe & Co. all my charter money, and they refused to pay me any more than the fifty-three thousand and forty-two francs and seventy-five centimes, frs. 53,042 $\frac{75}{100}$.

79 I handed to Barbe & Co. my bills of lading when I got to

Havre, all of them, for the purpose of collecting the frieght; I handed them also my charter-party, and after I consigned my vessel to them I had nothing to do with collecting the freights or the business of the vessel for this voyage to Havre; I left it to them, in fact all spoke French there and I could not speak French.

Redirect:

When I left, they promised to send the balance of the charter money to the owners, after paying the damages and costs; I did not agree to this.

A. C. OTIS.

Sworn before me this 12 July, 1865.

WM. D. JONES,
Not'y Public, N. Y. Co.

[Duplicate.]

Actual standing of the Am. ship Robert Cushman, Capt. A. C. Otis, with J. Barbe.

1862.		fr.
	By amount of net inward freight ac....	74,492 10
Oct. 27.	To amount of ship's ac., disbursements, &c.....	52,742 70
"	To amount of cash to capt.....200 fr.	
" 28.	" " " " .....100 fr.	300
March 20.	By r'ce to Baring Bros. & Co., £450, ...11,344 50 fr	
	By r'ce postage on r'ce.... 2 90	11,347 40
80		64,390 10

Balance left with J. Barbe, 10,102 fr.

E. & O. E., Havre, 20th November, 1862.

J. BARBE,
Havre.

A. C. O.
July 12, 1865.

Ship Robert Cushman, Capt. A. C. Otis in ac. with J. Barbe.

Ex., A. C. O. July 12, 1865.

1862.		fr.
Oct. 25.	To consols ac.....	127 95
	To S. Moisy, carpenter	869 45
	To Pollard, blacksmith.....	91 70
	To Lecoq, sailmaker.....	1,703 55
	To Hagenon & Powell, stevedores.....	1,415 95
	To Demanderin, for water.....	55
	To Hebert, attendance on hose.....	8
	To Bunidge, bootmaker for Coggins....	30

	To Hinter, for sundries	49	50
	do. tailor for crew	542	50
	To D. Rees, advance bill	200	
	do. crew's board	966	
	To Williams, stewards' board	137	35
	To Brion, officers, stewards, and boys' board	1,029	90
	To Cherfield, capt.'s board	276	
	To Leon, watchman	170	
81	To Wm. Rode, tailor for crew	85	50
	To Veyreer, towage out	100	
	To Santon, tailor for crew	33	50
	To Hantot, cooper	183	70
	do. do.	65	
	To A. N. Chrystie, for stages	20	
	To port warden's inspecting ship	12	
	To sweeping quay	5	
	To Louis, boatman	6	
	To Lefrancois, do.	18	
	To Franque, ship broker	8,431	85
Oct. 22.	To cash to capt	200	
" 25.	do.	300	
Oct. 4.	do.	200	
" 11.	do.	200	
" 23.	do.	500	
" 25.	do.	250	
	Carried over	18,783	40
" 25.	To J. Barbe, his ac	1,979	25
	do. for postages	19	85
Sept. 25.	To rec' to Baring, Bros. & Co, £636,6-6, 25, 20½, ⅛	16,638	50
" 26.	To rc'e to do. £600,0-0, 25, 17½, & ⅛	15,123	
	To postages on do	5	60
	To Boucher, painter	55	30
	To Louis, for sand	4	00
	To Channel, bootmaker for Samuel Spaight	11	00
	To Hagenon & Powell, stevedores	722	80
	Amount due to J. Barbe	fr. 52,742	70

E. & O. E. Havre, 26th October, 1862.

82 Per pro J. BARBE,
H. MOUSSET.

Endorsed: U. S. dist. court. Oliver Moses, and al, *vs.* James R. Boyd, and al. Supplemental dep'n of Capt. Albert C. Otis. Due service of a copy of within dep'n admitted, N. Y., August 4, 1865. Benedict, Bun & Benedict.

U. S. DISTRICT COURT, *Southern district of New York, ss:*

JAMES R. BOYD, *et al*, *ads.*
OLIVER MOSES, *et al.*

Thomas I. Stetson, a witness duly sworn and examined for the respondents, pursuant to the annexed consent, deposes as follows:

I am a shipmaster, and have been such nineteen years; have been sailing in the European trade from New York, New Orleans, and other ports on this side the ocean, to Liverpool and Havre, and the Mediterranean, &c.; for the last ten years I have been running between here and Havre; the vessels I have been master of have been from 800 tons to 1,350 tons.

I have had occasion, during this navigation, to carry lard; I have carried it more or less for the last ten years, almost every voyage I have had more or less lard and tallow; sometimes we carry lard and tallow in the lower hold, and sometimes in the between decks, it is according to what kind of a cargo I have; if I have heavy stuff, I put it in the lower hold and lard between decks, if lard was the heaviest cargo I had I should put it in the lower hold; I have carried my between decks full of lard and alcohol.

84 I have frequently had lard leak out of the casks on the between decks; lard always leaks some; I have had it leak out and I have heads come out of barrels. In cold weather lard don't run much, but in warm weather it will make the between decks pretty greasy.

Q. If the between decks of a ship is properly caulked and tight will lard leak through the seams?

A. No, sir, not if it is properly caulked. I have carried grain with lard; I have carried grain in the lower hold and lard between decks; I have carried it so when the lard leaked more or less; it would not injure the grain if the between decks were properly caulked.

Q. What effect would the leaking of lard upon the between decks have on the oakum in the seams during a voyage from here to Havre?

A. I should not say it would have any between here and Havre, thirty or forty days.

Cross-examined:

I am now in the employ of Boyd & Hincken, and have been in their employment for ten years past, and all the time as master of vessels; during that time I have commanded two vessels, the ship "William Frothingham," and the ship "Mercury," which I am now in; for the last four or five years I have carried some lard on most every voyage; in warm weather it is very apt to get soft and run; if it

85 lies on the wharf and gets warm it is pretty hard to cool off; when it gets warm it will work through the barrels; I do not like it as a cargo when it is running and is warm; I have not carried any grain for the last three years, or about that; the last which we

carried, I think, was in 1862; at that time we had the lower hold full of wheat, and carried in the between decks lard and alcohol; this was in the "Frothingham;" I think this was in the spring; for two years before that, we were carrying wheat, with lard in the between decks; we made three voyages a year, and some of them were in midsummer; these cargoes were taken on freight.

A deck, I mean the between decks, wants to be properly caulked, as well as the bottom of a ship, and when I speak of a vessel's between decks being properly caulked, this is what I mean.

Re-direct:

We often carry passengers in the between decks, and carrying fine goods in the hold; the decks want to be so tight that when they are washed the water will not go through; wherever water will go through grease will.

I never knew an instance of the oakum in seams being rotted by lard.

T. P. STETSON.

Sworn to before me, this 6th day of June, 1865.
[SEAL.] WM. D. JONES,
Notary Public N. Y. County.

86 Endorsed: U. S. district court. James R. Boyd, and al, ads. Oliver Moses, and al. Dep'n of Capt. Stetson for resp'd'ts. Benedict, Bun & Benedict, resp'd'ts proct, 76 Wall st.

87 U. S. district court.

JAMES R. BOYD, and al, *ads.* OLIVER MOSES, and al.

Affidavit of service.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Alfred T. Seward, of the city of New York, being duly sworn, doth depose and say, that he did, on the 30th day of March, in the year one thousand eight hundred and sixty-five, serve Owen, Gray & Owen, atty's in the above-entitled action, with a deposition, of which the annexed is the original, by delivering the same to Mr. Gray, one of the firm.

ALFRED T. SEWARD.

Sworn to before me, this 31 day of M'ch, 1865.
[SEAL.] WM. D. JONES,
Not'y Public, 74 Wall.

88 U. S. district court.

OLIVER MOSES, *et al*, }
vs.
JAMES R. BOYD, *et al.* }

We hereby consent that the deposition of Thomas H. Stetson and William T. Kelly may be taken at the office of Benedict, Bun & Benedict, *Bun & Benedict*, No. 74 Wall street, in the city of New York, on the 21st dayof March, A. D. 1865, at 3½ o'clock p. m., and that said deposition, when sworn to before a notary public, and without being filed, may be read upon the trial of this cause, on the part of the respondents, subject to all legal objections, except as to the mode of taking; the respondents to furnish us with a copy of the testimony.

OWEN, GRAY & OWEN,
For Lib'l'ts.

Dated New York, March 17, 1865.

Endorsed: U. S. dist. court. Boyd ads. Moses. Consent. Examination adjourned to Thursday, 3½. Owen, Gray & O., lib'l't's proct's.

89 U. S. district court.

OLIVER MOSES, *et al*, }
vs.
JAMES R. BOYD, *et al.* }

William T. Kelly, being duly sworn as a witness for the respondents, deposes as follows:

I live in New York. I am master of the ship Harpswell. I have followed the sea for fourteen years. I have been master two years, and was mate for seven years before that. I expect to go to sea in a few days.

I have been sailing between this port and France for the last nine years, chiefly to Havre. I have carried lard, I think, every voyage; not more than one or two voyages without lard. I have carried it sometimes in the lower hold, and sometimes in the between decks. When the lard would come down we would stow it wherever we had room for it. I have frequently carried lard in the between decks, and wheat in the lower hold. I have had the lard in the between decks leak. It will leak in the summer season, not so much in the winter. I have seen it on the between decks from an inch to four inches deep, so that we had to scrape it up.

Q. Did you ever know of the oakum in the seams of the between decks being rotted by the lard which so leaked out?

A. No, sir. I don't recollect of ever seeing anything of
90 that kind.

Q. If the between decks are properly caulked, can lard that leaks on it get through to the cargo below?

A. I should say not.

Q. How tight should the between decks be?

A. It should be caulked. I cannot answer how tight they should be.

Q. Should the between decks be as able to keep out water as the deck or outside of a ship?

A. Yes, indeed, sir, in all cases. If it will keep out water it will keep out grease.

Q. Will the oakum in seams, according to your experience, be rotted by lard leaking out upon it?

A. I should say not. I never saw it.

Cross-examined:

I have been master of the Harpswell for about four months. I have made one voyage in her to Havre and back. She is owned by Boyd & Hincken. I commanded next before her the ship "Quesnel," belonging to Trask & Dearborn, of this city. I had charge of her about four months. I went one passage in her from here to Liverpool. These are the only ships I have ever commanded. I was mate of her, before I took command of her, about two years; voyages were from here to Havre, and nowhere else. Before that I was mate for seven years in the ship Enterprise, belonging to Taylor & Rich.

91 Three of those years she was in the California trade, and four of them she was in the Havre trade. She was in the California trade first.

In the voyage to Havre in the Harpswell she carried lard in the between decks and lower hold. She sailed from New York on the 1st of November, 1864; carried no lard on the voyage to Liverpool in the Quesnel. I don't recollect that the vessel carried any lard on the voyages to or from California; the first voyage to Havre with lard was in 1857 or 1858. H. H. McLane was master. He is now in Buffalo. I recollect that the vessel left here in the summer. In 1863 the Quesnel left here in July for Havre, and had a passage of 48 days. She carried lard in the hold and between decks, and wheat in the lower hold; no wheat in the between decks. Her wheat was in bags. I never carried bulk grain between here and Havre. It is almost impossible to keep lard from leaking out of barrels in the summer season. In the winter time there is no difficulty. I should not think that lard will have a tendency to make oakum come out if the decks are well caulked and pitched. The stevedore, who usually loaded our vessels, was Henry Simson, No. 50 West street. I think that if a deck is tight enough to keep out water, it will keep out lard. I should think it would keep out melted lard.

Redirect:

Q. If the between decks is properly caulked, is it good stowage to put lard in the between decks and wheat in the lower hold.

92 A. We have always stowed it so, and never had any difficulty; never had a claim on the ship for a bag defaced.

In answer to the question how tight the between decks should be, I want to say that they should be as tight as the outside of a ship. I have scraped up lard on the between decks, both in the Enterprise and the Quesnel. I was in the New Orleans trade in the ship "Annanan." Then we carried lard in the between decks, plenty of it.

There was always loose grease there on the between decks. I have raked up five barrels of it, when we had had only 17 or 18 days from New Orleans here.

We had no grain in the lower hold, but plenty of flour; I never knew of the lard leaking through.

WM. T. KELLY.

Sworn to before me this 23d March, 1865.

[SEAL.] WM. D. JONES,
Notary Public, 74 *Wall st.*

Endorsed: U. S. district court. James R. Boyd, *et al*, *ads.* Oliver Moses, *et. al.* Dep'n of Wm. T. Kelly for resp'dts. Benedict, Bun & Benedict, resp'dts' proct's, 74 Wall st.

93 Interrogatories to be administered to Theodore Mousset, esq., and such other persons as may be brought before the commissioner; witnesses on the part of the respondents in a certain suit now pending in the district court of the United States for the southern district of New York, wherein Oliver Moses, Charles Owen, Galen Clapp, Frank O. More, Galen C. More, and Albert Otis are libellants, and James R. Boyd, John L. Boyd, jr., and Edward W. Hincken are respondents, under the commission hereto annexed directed to Cicero Brown, esq., merchant of Havre, France.

First. What is your name, residence, and occupation?

Second. Did you know of the arrival of the ship "Robert Cushman" in the port of Havre in the summer of 1862? Did you see her at or soon after her arrival? Did you see any of the cargo of said vessel, when it was being discharged from said vessel?

Third. Do you know of the condition of the decks of said vessel on said voyage? if so, please now to state their condition as to tightness, being properly caulked, &c.

Fourth. If you say that you saw the said cargo of said vessel or any of it, please now to state what was its condition; whether
94 any of it, and if so, what portion of it was damaged?

Fifth. If you have stated that any portion of said cargo was damaged, please now to state particularly where such portion was stowed in said vessel, and also describe particularly the nature and cause of such damage.

Sixth. If you state that any of the cargo in the lower hold of said vessel was damaged by lard, please now to state whether it was possible to know whether such damage was caused by the lard stowed in the lower hold or the lard stowed between decks.

Seventh. If you state that any of said cargo was damaged by lard, please now to state from your examination of the said vessel how said lard reached such cargo.

Eighth. If you state that any of the cargo of said vessel was damaged by lard, please now to state whether such cargo would have been so damaged in case the between decks had been properly caulked, and the hatches made tight.

Ninth. If you have stated that any portions of said cargo were damaged, please now to state the amount of loss in value of
95 such cargo by reason of such damage.

Tenth. Have you any knowledge as to the method of carriage of lard in vessels similar to the "Robert Cushman;" if so, state whether such vessels frequently carry lard in their between decks on voyages from New York to Havre and similar voyages.

Eleventh. If you state that you know of the carriage of lard in the between decks on voyages between New York and Havre, please now to state whether in any such cases you have known of damage to other cargo caused by the lard having been so stowed.

Twelfth. Do you know who collected the freight due from the various consignees of said cargo upon the bills of lading? if so, please to state whom, and also if you can state the gross amount of freight paid by said consignees on such bills of lading.

Thirteenth. If you state that Mr. J. Barb collected the freights paid by the consignees, please now to state from whom said J. Barb received said bills of lading for the purpose of collecting said freights, and to whom they credited the amount of freights so collected by them.

Fourteenth. Do you know any other matter or thing of
96 benefit or advantage to the respondents in this action? If so, state the same as fully as if you were interrogated thereto.

BENEDICT, BUN & BENEDICT,
Resp'dts' Proctors.

GENT: Please take notice that we shall present the foregoing interrogatories to the judge of this court at the court room No. 41, Chambers st., N. Y., for his allowance on the 15th day of October, 1863, at 11 A. M.

Oct. 7, 1863.

Yours, &c.,
BENEDICT, BUN & BENEDICT,
Resp'ts' Proctors.

To OWEN, GRAY & OWEN,
Lib'ts' Proctors.

Interrogatories settled by consent, subject to all legal objections. M'ch 5 '64.

BENEDICT, BUN & BENEDICT,
Resp'dts' Procts.
OWEN, GRAY & OWEN,
Lib'ts' Proct's.

Endorsed: U. S. district court. James R. Boyd, *et. al, ads.* Oliver Moses, *et. al.* Interrogatories. Benedict, Bun & Benedict, resp'dts' procts., 74 Wall st.

Due service of a copy of the within interrogatories and notice of presenting same for allowance is hereby admitted.

Oct. 7, 1863.

OWEN, GRAY & OWEN,
Lib'ts' Proct's.

Settlm't adj'd to 21st at 11 A. M., Oct. 15, '63.
OWEN, GRAY & OWEN, *Lib'ts' Procts.*

97 Cross-interrogatories to be administered to the witnesses produced and examined on the part of the respondents, in a certain action pending in the district court of the United States for the southern district of New York, wherein Oliver Moses and others are libellants, and James R. Boyd and others are respondents, under and by virtue of the writ of commission, which is hereto annexed:

First cross-interrogatory. Were you, or your house, or firm, consignees or agent of the ship Robert Cushman, at the port of Havre, on the voyage referred to in the direct interrogatories? If not, then state who were such consignees and agents at that time, and whether or not they were the friends of, or appointed by Boyd & Hincken, of New York, the charterers of the vessel. State what connection (if any) you yourself had with the vessel and cargo; what duties you performed in reference thereto.

Second cross-interrogatory. When did the ship Robert Cushman arrive at Havre? Give the date as nearly as you can. How soon after her arrival, if at all, did you go on board? Did you, or any person in your presence, survey the hatches of the vessel, and stowage and dunnage of the cargo before it was discharged?

98 If so, when? By whom in particular was such survey called; who appointed the surveyors? Were they not appointed by the American consul? To whom did they make their report? Was their report in writing? and if yea, please produce and annex to your deposition copies thereof, and of all the papers connected with such survey, stating where the original documents were and are filed.

Third cross-interrogatory. Did you, or any person in your presence, survey the cargo, or any and what part thereof, while it was on board the ship? If yea, by whom were you or the surveyors appointed? When, where, and how was such survey made? How much of the cargo had been then discharged? Was there a report made in writing of such last-mentioned survey? If so, please produce and annex copies thereof, and of all the papers connected therewith, stating how you know that the papers produced are copies of the originals, and where such originals are filed.

Fourth cross-interrogatory. Did not the reports of the damages to the cargo (made by the surveyors thereon) state, and was not that the fact, that the damage to the grain or other cargo in the lower hold had proceeded from the lard which had been stowed

99 in the between decks, and which had leaked out of the casks, and penetrated through those decks into and upon such cargo? Have you not stated heretofore that the damage to the cargo in the lower hold was occasioned in that way?

Fifth cross-interrogatory. If, in answer to the 8th interrogatory, you undertake to say that the cargo would not have been damaged if the between decks had been properly caulked, and the hatches made tight, state, if you please, how you know that fact, and whether you saw, or have any knowledge of your own as to the caulking of the between decks and hatches? Do you know anything upon that subject except what you have heard from others?

Sixth cross-interrogatory. State whether all, or what portion of the damaged cargo was sold, and how and by whom the same was so sold. If it was sold at public auction, then please produce and annex true copies of the account of all such sales, showing the price at which the cargo was sold, the charges and expenses on account thereof, and the nett proceeds of sale.

100 Seventh cross-interrogatory. Did you or your firm keep any account in your books with the ship, or with her master, Captain Otis? If so, please produce and annex a true copy of such account, and of all entries on the debit and credit side thereof. If anything was charged therein against the ship, on account of the damage to the cargo, state how much was so charged, and produce and annex an account of the items so paid for damages, with the particulars thereof, and to whom and when the same was paid? State if such damages were those before referred to as having been occasioned by the lard penetrating through the seams of the plank of the between decks. How much did the freight list of the cargo amount to, according to the bills of lading? Did you or your house collect such freight? Was all the freight payable under the bills of lading collected by you, or your house? If not, how much was not collected? Have you or your firm any account with the charterers, Boyd & Hincken, of New York, in your books in reference to such freight? If so, state if you have ever rendered to them a copy thereof, or any account of the freight and primage collected by you on the cargo in question. Please produce and annex to your deposition a copy of such account with Boyd & Hincken, in whatever way or name the same stands on your books.

101 Eighth cross-interrogatory. If, in answer to the 10th interrogatory, you say you have knowledge of the carrying of lard in vessels similar to the Robert Cushman, then state in what your knowledge of that consists. State in particular how many and what vessels you have known to carry lard in the between decks; give the name of each of such vessels; and state, also, in what season of the year they respectively made the voyage. Give the names of the masters thereof respectively; also the names of the consignees therefor.

Last cross-interrogatory. Do you know, or can you state any other matter or thing which will tend to the benefit of the libellants in this cause? If so, state the same.

OWEN, GRAY & OWEN,
Libellants' Proctors.

Cross-interrogatories settled by consent, subject to all legal objections.

M'ch 5, '64.

OWEN, GRAY & OWEN,
Lib'l's' Proc's.
BENEDICT, BUN & BENEDICT,
Resp'd'ts' Proc's.

Endorsed:

102 U. S. district court. Oliver Moses, *et als, vs.* James Boyd, *et als.* Cross-interrogatories. Owen, Gray & Owen, lib'l's' proc's. Rec'd and ex'd Dec'r 11, '63.

103 Interrogatories to be administered to Mr. J. M. Le Tellier, and such other persons as may be brought before the commissioner, by or on behalf the libellants; witnesses on the part of the part of the libellants in a certain suit pending in the district court of the United States for the southern district of New York, wherein Oliver Moses and others are libellants, and James R. Boyd and others are respondents, under and by virtue of a commission in the said suit, out of the said court, and which is hereto annexed:

First interrogatory. What is your name, age, residence, and occupation? Were you in the month of September and October, 1862, one of the sworn surveyors of the tribunal of commerce at Havre, or otherwise, and how connected with such surveyors.

Second interrogatory. Do you know of the arrival of the ship Robert Cushman, A. C. Otis, master, from New York, in September, 1862? If so, how soon after her arrival did you go aboard of her, and at whose request, and for what purpose did you go on board? Had she commenced discharging any of her cargo before you went aboard?

104 Third interrogatory. Were you at or about that time appointed or selected by the American consul at Havre, or by any person, and by whom, to attend upon or assist in the discharge of such cargo of the ship Robert Cushman, or otherwise to ascertain and determine the condition of the stowage, dunnage, and arrangement of her cargo, or for what other purposes? and did you accept and act under such appointment, or in any other, and in what capacity? State fully by whom, and for what purpose, you were appointed or employed; and who, if any person, aided in the performance of such duties.

Fourth interrogatory. If you were so appointed by the American consul, or otherwise, then state generally how and in what way your duty was discharged; state particularly what part, if any, you took in discharging such cargo. Were the various hatches leading from the between decks into the lower hold surveyed or examined? If so, state how they were secured, and whether or not they were well and properly secured; state particularly whether you examined the stowage and dunnage of the cargo in the lower hold, as well as in

105 the between decks; and if so, then state whether or not that portion in the lower hold was well and properly stowed and dunnaged; and if any was not, then state what in particular, and in what part of the ship the cargo, which was not properly stowed, was found; whether in the lower hold or in the between decks; state the cause of the damage to the cargo, whether it arose from perils of the seas, or from what cause.

Fifth interrogatory. Did you make any report of your examination and survey? Was any list or memorandum made of the portions of the cargo which was found to be damaged? If so, state whether or not such list or statement was correctly made, and whether or not it was annexed to your report; state what was done with the report and such list or statement. If you say they were delivered to, or filed with, the American consul, then please request the consul to

furnish a certified copy of the appointment and of your report, and of all your proceedings in the matter which are of record in his office, to be annexed hereto; and state if the same is a true copy thereof, and of the report of your acts and doings under such appointment, and whether your report contained a true statement of all the damages and of the particulars thereof as found by you, and the causes thereof.

106 Sixth interrogatory. State whether or not the lard which was in the between decks had become melted; and whether or not it had leaked out of the casks, and about how many of the casks in the between decks had lost portions of the lard. What was the cause of such leakage? Was it from bad cooperage, or from what other cause? State whether or not there was lard upon the floor of the between decks, and how much. Was it a large or small quantity? How did those between decks appear? Were they or not saturated with the lard which had leaked from the casks stowed thereon.

Seventh interrogatory. State, if any, and if so, what portion of the wheat or other cargo, besides the lard in the lower hold, was damaged, and whether or not it was from the lard which had been stowed in the between decks dripping or leaking through those decks upon it, or from what other cause.

Eighth interrogatory. State whether or not you examined the caulking of the between decks; and if so, state whether or

107 not there was great heat in the between decks, such as would be likely to increase the melting of the lard, and what caused such heat. If you say it was from the heat of the grain in the lower hold, then state what effect such heat had upon the floors of the between decks; whether or not it tended to shrink them and loosen the oakum in the seams thereof.

Last interrogatory. Do you know, or can you state any other matter or thing which will tend to the benefit of the libellants? If so, please state the same.

OWEN, GRAY & OWEN,
Lib'l'ts' Proc's.

Interrogatories settled by consent, subject to all legal objections. M'ch 5, '64.

OWEN, GRAY & OWEN,
Lib'ts' Proc's.
BENEDICT, BUN & BENEDICT,
Resp'ts' Proct's.

Endorsed:

U. S. district court. Oliver Moses, *et als, vs.* James R. Boyd, *et als.* Interrogatories. R. & W., Dec. 11, '63. Owen, Gray & Owen, lib'l'ts' proctors.

108

109 Cross-interogatories to be administered to J. M. Le Tellier, and such other persons as may be brought before the commis-

sioner, by or on behalf of the libellants; witnesses, on the part of the libellants, in a certain suit pending in the district court of the United States for the southern district of New York, wherein Oliver Moses and others are libellants, and James R. Boyd and others are respondents, under and by virtue of a commission in the said suit, out of the said court, and which is hereunto annexed:

First cross-interrogatory. If, in answer to the 4th interrogatory, you state how the hatches of the said vessel was secured, now please state whether you saw all the hatches of said vessel before they were opened. Might not such hatches or some of them been opened after the arrival of said vessel in Havre, and before you surveyed them.

Second cross-interrogatory. If, in answer to the 4th cross-interrogatory, you say that you examined the stowage and dunnage of the cargo in the lower hold, as well as in the between decks, now please to state whether you made such examination alone or in company with others; and if so, of what person; and please also to state whether you, yourself, carefully examined the stowage and
110 dunnage of every portion of the cargo of said vessel.

Third cross-interrogatory. If, in answer to the 5th interrogatory, you state that you made any report of your examination and survey of said vessel, now please to state whether you know and can state, of your own personal knowledge, every fact set forth in such report to be true. and that such, your report, contained the truth, the whole truth, and nothing but the truth.

Fourth cross-interrogatory. If, in answer to the 5th interrogatory, you state that any list or memorandum was made of the portions of the cargo which was damaged, now please to state whether you, yourself, made such list or memorandum, and whether it was made from your own personal examination, and when it was made, and whether you know of your own personal knowledge that every portion of such list or memorandum is strictly true.

Last cross-interrogatory. Do you know any other matter or thing which will be of benefit or advantage to the defendants? If so, please state the same as fully and effectually as if you were specially interrogated thereto.

BENEDICT, BURR & BENEDICT,
Att'ys for Def'ts.

111 Cross-interrogatories settled by consent, subject to all legal objections.
M'ch 5, '64.

BENEDICT, BUN & BENEDICT,
Resp'ts' Proct's.
OWEN, GRAY & OWEN,
Lib'ts' Proc's.

Endorsed:
U. S. district court. Oliver Moses, *et al. vs.* James R. Boyd, *et al.*, Cross-interrogatories. Benedict, Bun & Benedict, def'ts' proct's, 74 Wall st., N. Y.

The execution of this commission appears in certain schedules hereunto annexed.

JAMES O. PUTNAM
CICERO BROWN.
Commissioners.

113 Deposition of witnesses produced, sworn, and examined the 13th, 14th, and 22d days of February, 1865, under and by virtue of a commission issued out of the district court of the United States for the southern district of New York, in a certain cause therein depending, and at issue between Oliver Moses and others, libellants, and James R. Boyd and others, respondents:

Theodore Mousset, aged forty years and upwards, being duly sworn, and publicly, pursuant to the directions hereto annexed, and examined on the part of the respondents, doth depose and say, as follows:

First. To the first interrogatory he saith: Theodore Mousset; residence at Havre, in the empire of France; occupation a general shipping and commission merchant.

Second. To the second interrogatory he saith: I did know of her arrival, and saw the Robert Cushman soon after her arrival, but saw none of her cargo whilst it was discharging.

Third. To the third interrogatory he saith: I do not, and can state nothing in reply.

Fourth. To the fourth interrogatory he saith: As I saw nothing, as already stated, I can make no reply.

114 Fifth. To the fifth interrogatory he saith: I know nothing of the matter inquired of.

Sixth. To the sixth interrogatory he saith: I know nothing of the matter.

Seventh. To the seventh interrogatory he saith: I know nothing of the matter.

Eighth. To the eighth interrogatory he saith: Same answer as last before.

Ninth. To the ninth interrogatory he saith: I have answered the foregoing interrogatories so negatively, because they were based upon the supposition that I saw the lard and other cargo as it was discharged. I saw no portion of the cargo while on the ship, and while discharging. But about ten days after the cargo was discharged, I saw all the damaged wheat which constituted a part of the cargo. The bulk of such damaged wheat was sold by order of the tribunal of commerce, and the loss upon that so sold was including the ship's portion of the court, and other necessary expenses incurred, by reason of such damage, six thousand two hundred and nine francs and seventy centimes; also another loss upon certain sixty-eight bags of wheat, amounting to one hundred and sixty-one francs ninety-five centimes, as agreed between the captain and

115 consignee.

Tenth. To the tenth interrogatory he saith: From personal observation I know nothing inquired of.

Eleventh. To the eleventh interrogatory he saith: I cannot state.

Twelfth. To the twelfth interrogatory he saith: The house of "J. Barb" collected all the freight; the gross amount of freight and primage was seventy-nine thousand eight hundred and sixty-three francs ninety-five centimes, or fifteen thousand two hundred and twelve dollars and nineteen cents. Exchange five francs and twenty-five centimes to the dollar upon the bills of lading and freight list.

Thirteenth. To the thirteenth interrogatory he saith: J. Barb received the bills of lading from the captain of the "Robert Cushman." The amount of freight and primage was credited to the ship, seventy-seven thousand two hundred and twenty-seven francs and fifty centimes, and to the credit of Boyd and Hincken two thousand six hundred and thirty-six francs forty-five centimes. There was a further sum of eight hundred and eighty-seven francs and fifty centimes collected as freight and primage on ninety-nine tierces of lard, over and above the sum given in my reply to the 12th interrogatory, for which there were no bills of lading, and which was credited to Boyd
116 & Hincken.

Fourteenth. To the fourteenth interrogatory he saith: I know nothing further, but will state that the reason why I have responded to some of the interrogatories, ignoring personal knowledge of the facts inquired of, is, that as a member of the house of J. Barb, my duties were strictly confined to the office, the attendance upon ships discharging devolving upon Alexis Lepretre, head clerk in the out-door department.

THEODORE MOUSSET.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 13th day of February, 1865, before—

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.

First. To the first cross-interrogatory he saith: The house of J. Barb was consignee, and delivered the cargo to the several claimants, collected the freight, and made up the accounts, and paid the monies after collected.

Second. To the second cross-interrogatory he saith: Arrived Sept. 21, 1862. I never went on board, nor saw any survey. I have no doubt the survey was ordered by the American consul and the same made as usual, and the report in writing, but I know nothing
117 in relation thereto of my own knowledge.

Third. To the third cross-interrogatory he saith: I know nothing of the matter inquired of.

Fourth. To the fourth cross-interrogatory he saith: I saw in the hands of the captain's lawyer in Havre what purported to be a copy of the report of surveyors, that I remember stated that the damage was occasioned by the lard which had been stowed in the between decks, and leaked out, as stated in the interrogatory. I don't think I ever so stated, because I never saw the stowage.

Fifth. To the fifth cross-interrogatory he saith: I know nothing of the matter inquired of.

Sixth. To the sixth cross-interrogatory he saith: All the damaged cargo—that is, all the damaged wheat was sold at auction, except sixty-eight bags belonging to Edward Barlow, and for which the damage was stipulated at one hundred and sixty-one francs and ninety-five centimes, said sale ordered by the tribunal of commerce, and made by a sworn broker in behalf of parties interested. The accounts of sales and expenses were soon after the sales given to the captain of the ship, so far as I remember; and I am unable to give copies of the account of sales and expenses, as they were not made up by my house, and our books only showing the total amounts claimed, as per Exhibit "A," hereto annexed.

118 Seventh. To the seventh cross-interrogatory he saith: We did such an account; a copy of such account is hereto produced and annexed, marked "B." The damages were those occasioned by the lard, but of whose location I know nothing personally. The freight list, according to the bill of lading, amounted to seventy-nine thousand eight hundred and sixty-three francs and ninety-five centimes. Our house did collect the freight and all that was payable. We have such an account with Boyd & Hincken. We have notified them of the balance, but so far as I remember, have rendered them no detailed account. The account I speak of is a general account current, inclusive of the amount credited to them from the freight of the "Cushman," together with many other transactions running through the year's business. The items credited them on account of such freight are—1st, twenty-six hundred and thirty-six francs and forfty-five centimes, being the difference between the amount earned by the ship, as per charter party, and the amount of bills of lading; and 2d, eight hundred and eighty-seven francs and fifty centimes freight on 99 tierces of lard for which there was no bill of lading.

Eighth. To the eighth cross-interrogatory he saith: Have no personal knowledge.

119 Ninth. To the ninth cross-interrogatory he saith: I know nothing.

THEODORE MOUSSET.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 13th day of February, 1865, before—

JAMES O. PUTNAM,
C. BROWN,
Commissioners.

120

121 John Frederick Wanner, produced under the general power of the commission, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the respondents, doth depose and say as follows, to wit:

First. To the first interrogatory he saith: My name is John F. Wanner; have for forty years resided in the city of Havre as a merchant, and for about twenty years resident consul of Switzerland.

Second. To the second interrogatory he saith: I know generally of her arrival, but saw nothing of her cargo while discharging.

Third. To the third interrogatory he saith: I knew by observation the condition of her between-decks, particularly while she was lying in the port after the discharge of her cargo, as I was appointed by the tribunal of commerce to examine her condition, with two other parties named by the tribunal. We went with a caulker by profession to examine the between decks. We found the oakum in the seams rotten, or the entire absence of oakum. This was ascertained by the use of the caulker's instruments.

Fourth. To the fourth interrogatory he saith: I saw a large
122 quantity of wheat in bags after it had been discharged on the quay, which was much damaged by grease or lard. The exact proportion I cannot state.

Fifth. To the fifth interrogatory he saith: I cannot speak of the position of the cargo on the ship. The nature of the damage was that which comes from commingling of grease with grain.

Sixth. To the sixth interrogatory he saith: I cannot speak of the matter inquired, as I did not see the cargo discharged except from observation, as before stated. I cannot state the proportion of damage from lard in the hold and lard between decks.

Seventh. To the seventh interrogatory he saith: I can only give it as my opinion that it was occasioned by leaking through the seams of the between decks. I saw at the examination the traces of the drippings of the grease through the seams of the between decks.

Eighth. To the eighth interrogatory he saith: In my opinion, had the between decks been in a proper condition, there would have been no leakage, and consequently no damage from that portion of the cargo to that in the hold.

123 Ninth. To the ninth interrogatory he saith: I cannot state.

Tenth. To the tenth interrogatory he saith: I cannot state.

Eleventh. To the eleventh interrogatory he saith: I cannot state.

Twelfth. To the twelfth interrogatory he saith: I know nothing of the matter inquired of.

Thirteenth. To the thirteenth interrogatory he saith: I know nothing relating to the financial adjustments of sales and of the cargo.

Fourteenth. To the fourteenth interrogatory he saith: I know nothing.

F. WANNER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this fourteenth day of February, 8165, before

JAMES O. PUTNAM,
C. BROWN,
Commissioners.

First. To the first cross-interrogatory he saith: I was not of the house of J. Barb, and know nothing of the matters inquired of.

124 Second. To the second cross-interrogatory he saith: The

"Cushman" arrived about 20th September, 1862. I went on board after discharge of cargo, about 9th of October. I know nothing of the other matters.

Third. To the third cross-interrogatory he saith: I know nothing of the matters inquired of.

Fourth. To the fourth cross-interrogatory he saith: I cannot state, as I had nothing to do with the survey of the cargo, or in any capacity, except as stated in my direct examination.

Fifth. To the fifth cross-interrogatory he saith: I can only repeat what I stated in my replies to the sixth, seventh, and eighth direct interrogatories. I went on board the Robert Cushman, with two other gentlemen appointed by the tribunal of commerce for the purpose, and examined the between decks, and in many places the instrument went through the seams as if there was no substance to resist it. We took into our hands what was used as caulking, and it in many instances had lost the appearance of oakum; it was a bad, rotten substance which could not resist the passage of such a substance as lard. I speak from my observation.

125 Sixth. To the sixth cross-interrogatory he saith: I know nothing except hearsay of the sales.

Seventh. To the seventh cross-interrogatory he saith: I know nothing of the matters inquired of.

Eighth. To the eighth cross-interrogatory he saith: I have nothing to say in reply, as I have no knowledge of the custom.

Last cross-interrogatory. I know nothing, and can state nothing further.

F. WANNER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 14th day of February, 1865, before—

JAMES O. PUTNAM,
C. BROWN,
Commissioners.

126

127 Deposition of J. M. Le Tellier, a witness produced, sworn, and examined in behalf of the libellants.

First. To the first interrogatory he saith: Joseph M. Le Tellier; aged fifty-one years; am a sworn surveyor of the tribunal of commerce, and was such in the year 1862.

Second. To the second interrogatory he saith: I did know of the arrival of the Cushman; was appointed surveyor of her cargo, her stowage and dunnage, by the United States consul at Havre. I went on board within 48 hours after her arrival, and before any part of her cargo was discharged.

Third. To the third interrogatory he saith: I was appointed, as stated in my last reply, to examine and survey the hatches and cargo, and see if the latter was properly stowed, according to the regulations of the port, to verify the damage to the cargo (if any,) and account

for the same, and make report thereon to the United States consul at Havre. I was the only surveyor.

Fourth. To the fourth interrogatory he saith: I attended while the cargo was being discharged, always twice during each day; re-
128 mained long enough to see the general stowage and condition of the cargo taken out, and the condition as it then presented itself in the ship; and I also visited the ship specially, *and I also visited the ship specially* when any discovery of damage to the cargo was announced to me; and in such cases I always examined the portion so damaged before it was disturbed in the hold, or elsewhere in the ship. The hatches were all surveyed and examined; they were caulked with oakum in the seams, and they were well and properly secured.

I did examine the stowage and dunnage in the lower hold, and that portion in the lower hold was well and properly stowed and dunnaged.

In the between decks, before or forward the main hatch, I found sacks of wheat in contact with casks of lard, which was not proper stowage according to the regulations in force in this port.

The damage to the cargo between decks came from the lard, and that occasioned for the want of the barrels not being sufficiently tight.

The cargo in the lower hold was well stowed and dunnaged, the lard being stowed at each end of the ship and the wheat in the mid-
dle, the lard being separated from the wheat by wooden bulk-
129 heads lined with canvass. The lard in the between-decks had escaped from the barrels, run into the seams, rotted the oakum, and so penetrated on to the wheat in the lower hold. That, in my opinion, is the occasion of the damage to the wheat in the lower hold.

Fifth. To the fifth interrogatory he saith: I did make a report of my examination and survey, and in my report enumerated the part of the cargo damaged, and correctly, as I believe. The report was deposited in the United States consulate, a true copy of which is hereby certified by me, as well as by the consul, and is marked "C," and contains a true statement, as I believe, of the damages and particulars thereof, &c., &c.

Sixth. To the sixth interrogatory he saith: I can only answer by reference to my report, made after the examination and immediately after the survey, and on such reference I find that 26 casks were entirely empty, and 327 casks had leaked more or less. The reason of the leakage was bad cooperage. There was but very little lard on the floor of the between decks. The floor appeared impregnated with lard.

130 Seventh. To the seventh interrogatory he saith: About 3,000 sacks of wheat were more or less damaged, and this damage was occasioned by lard leaking through the between-decks.

Eighth. To the eighth interrogatory he saith: I did examine the caulking, and found that where the lard had settled the oakum was rotten, and where the lard had not settled the oakum was sound.

There was great heat in the hold, which was calculated to increase the melting of the lard; the heat occasioned by fermentation of the wheat, and that fermentation produced by the lard brought in contact with it. The heat would cause the decks to shrink and the seams to open.

Last interrogatory. I know nothing further.

LE TELLIER.

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this 22d day of February, 1865, before—

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.
JOHN S. HUNT,
Interpreter.

131 First. To the first cross-interrogatory he saith: I examined all the hatches of the ship before they were opened. Nothing about the hatches indicated that they had been previously opened. I do not think they could have been without leaving some appearance of it.

Second. To the second cross-interrogatory, he saith: I made the examination in company with the first mate or captain, I don't remember which. I did personally examine carefully the stowage and damage of every portion of the cargo.

Third. To the third cross-interrogatory he saith: I do know and can state of my personal knowledge the truth of the report and of the facts stated therein, and that it is the whole, and nothing but the truth.

Fourth. To the fourth cross-interrogatory he saith: I myself did make the report and the list detailed therein, and it was made from and after my personal examination, and made within twenty-four hours after the entire discharge of the ship, from memorandums taken by me from time to time as I examined the ship and cargo. I do know that the whole of the report and list is strictly true.

Last interrogatory. I can add nothing.

132 LE TELLIER.

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this 22d day of February, 1865, before

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.
JOHN S. HUNT,
Interpreter.

Commissioner's fees ..... 250 francs.
U. S. consul per certified copy of report of surveyors .. 50

300 francs.

To be remitted to J. O. Putnam.

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.

Havre, Feb. 22, 1865.

133 [SEAL.] [SEAL.]

UNITED STATES CONSULATE, HAVRE.

I, James O. Putnam, consul of the United States for the port and district of Havre, do hereby certify that Mr. J. M. Le Tellier, one of the sworn surveyors of the tribunal of commerce of this city, was duly appointed by me to examine and survey the stowage and dunnage of the cargo laden on board the American ship, Robert Cushman, of Bath, J. M. Otis, master, and the damage sustained by the same during late voyage from New York bound to this port, and to make a report thereof to me at this office. I further certify that he made a report accordingly, of which the following is a correct extract:

"Nous nous sommes transporte ce jour, 22 Septembre, a 2 heures de relevee, 1862, abord du dit navire poste et amarre dans le bassin de l'Eure, cote ouest, le capitaine present, nous avons procede a l'ouverture de ecoutilles, que nous avons trouvees bien fermees et recouventes de bons pretants.

"Ayant ete requis pour constater l'arrimage des marchandises composant la cargaison du fur et a mesure de leur debarquement nous avons reconnu et constatons que l'arrimage du chargement tant dans l'entrepont que dans la cale etait bien fait et selon les prescriptions du reglement d'arrimage en viguer au Port du Havre, sauf
134 a l'egard de soixante-huit sacs de ble a la marque [I] que se trouvaient dans l'entrepont sur l'avant de la grande ecoutille et en contact avec des futs sain-doux, ce qui constitue un mauvais arrimage. Nous avons egalement constate que le futs de sain-doux plus ou moins vidange ou vides avec marques plus ou moins lisibles portes d'autre part etant bien arrimes et que la coulage ou vidange des dits futs n'est provenu que de leur marque de serren ce qui constitue un vice propre de la chase dans la cale comme dans l'entrepont (sauf les soixante-huit sacs de ble en contact avec les futs et reconnu mauvais arrimage) les futs de sain-doux se trouvaient arrimes devant et derriere et separes des bles par des cloisons et garnitures plus que suffisantes pour empecher tout contact entre les futs et les bles, aussi les sacs de ble et autres marchandises arrimes dans la cale, n'ont ils ete avaries que par suite du coulage de sain-doux qui s'est infiltre dans la cale par les coutures des bordages, par les gatles et contre

gatles de l'entrepont, le calfatage du dit entrepont a ete reconnu par nous avant ete bien fait, nous avons egalement reconnu des orgues tant d'un bord qui de l'autre et les ecoutilles hermetiquement fermes et calfatees d'ou il resulte que les dites avaries sont survenues par suite des fatigues et brusques mouvements que le navire a eprouves dans sa traversee, ce qui constitue des avaries par fortune de mer, mais il n'en est pas de meme pour les douvelles qui formaient grenier tant dans l'entrepont que dans la cale et qui sont impregnees plus ou moins de sain-doux; leur contact avec les futs constitue un mauvais arrimage.

135 *Designation des merchandises avariees.*

Marques.		Plus ou moins vidanges.	Vides.
A B	Trente-trois futs sain-doux	25	8
[H] C	Quatorze...do.....do.	14	0
S S	Quatre.....do.....do.	4	0
y | P	Cinq..... do.....do	4	1
W & M	Quarante et un futs sain-doux	41	0
[U]	Vingt.....do....do	19	1
F P	Trois.....do....do	3	0
[V]	Douze.....do....do	12	0
H & C	Trois.....do....do	3	0
[L] H	Quarante-cinq..do....do	35	10
C A D	Dix-sept.....do....do	17	0
H & S	Deux..... do....do	2	0
[L D]	Trente-trois.... do....do	28	5
[L] D	Cinq.....do....do	4	1
[L] C	Quatre..... do....do.	4	0
S P B	Un..... do....do	1	0
S | marques.	Cent-onze[c].....do....do	111	0
	Ensemble trois cent cinquante-trois futs sain-doux en vidanges ou vides par vice propre.	327	26
M C A G [1]	Mille douze cent sacks de ble	1,200	00
	Six cents.....do....do	600	00
	Mille cent.....do....do	1,100	00
	Cent soixante-dix do....do	170	00
	Ensemble trois mille soixante des sacs de ble avaries par fortune de mer.	3,070	00
A [ ]	Vint-huit sacs de cacao avaries par fortune de mer. Douvelles cinq mille quatre cent impregnees de sain-doux par suite de mauvais arrimage.		

[c] Cent onze futs de sain-doux plus ou moins vidange sur les quels il nous a ete impossible de lire les marques qui ont du etre effacies par le contact exterieur de sain-doux.

136 "Le dechargement du navire termine le 7 Octobre, 1862, a 6 heures du soir."

Given under my hand and official seal at Havre, the 7th September, 1864.

[SEAL.] JAMES O. PUTNAM, *Consul.*

At the execution of a commission for the examination of witnesses, between Oliver Moses and others, libellants, ag't James R. Boyd and others, respondents; this paper writing was produced and shown to Theodore Mousset and by him deposed unto at the time of the examination. Before

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.

137 A.

tatement of the "Robert Cushman's" affairs with M. M La Motte & Co., and J. Ges. Schmidt & Co.

Paid to M. M. La Motte & Co., as per ac.	frs.	3,546 11
Paid to J. G. & Co., as per ac.		1,400 60
Paid to tribunal of commerce, as per ac.		588 40
Paid to lawyers, as per ac		200 00
Paid to copy of documents		17 50
Paid to Bisson, accountant		35 50
Paid to watchmen, day and night, from the 6th to the 29 Oct., and hire of office, frs. 384		
To deduct rec'd from La Motte, frs. 115		
Rec'd from J. G. Schmidt, 50—165		219 00
Value for work to damaged wheat		203 20
Commission and attendance		.....
	frs.	6,209 70

J. BARBE, *Havre.*

I certify this copy to be a true copy of J. Barbe's books.
Havre, 13th February, 1865.

TH. MOUSSET.

At the execution of a commission for the examination of witnesses between Oliver Moses and others, libellants, ag't James R. Boyd and others, respondents; this paper writing was produced and shewn to Theodore Mousset and by him deposed unto at the time of the
138 examination. Before

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.

139 B.

Ship "Robert Cushman," Capt. Otis, in ac. with J. Barbe.

1862.

October 25.	To consuls ac	frs.	127 95
	To S. Moisy, carpenter		869 45
	To Pollard, blacksmith		91 70
	To Lecoq, sailmaker		1,703 55
	To Hagenon & Powell, stevedores		1,415 95
	To Demondesir, for water		55 00
	To Hebert, attendance on hose		8 00
	To Bunage, bootmaker, for Coggins		30 00
	To Hurter, for sundries		49 50
	To Hurter, tailor, for crew		542 50
	To D. Rees, advance bill		200 00
	To D. Rees, crew's board		966 00
	To Williams, steward's board		137 35
	To Buin, officers, stewards, and boys' board		1,029 90
	To Cherfils, captn's board		276 00
	To Leon, watchman		170 00
	To W. Rode, tailor, for crew		85 50
	To Veyrier, towage out		100 00
	To Santon, tailor, for crew		33 50
	To Hantot, cooper		183 70
	To Hantot, cooper		65 00
	To A. N. Chrystie, for stages		20 00
	To port wardens, inspecting ship		12 00
	To sweeping quay		5 00
	To Louis, boatman		6 00
	To Lefrancois, boatman		18 00
	To Franque, ship broker		8,431 85
140 22.	To cash to capt.		200 00
25.	To cash do.		800 00
4.	To cash do.		200 00
11.	To cash do.		200 00
23.	To cash do.		500 00
25.	To cash do.		250 00
	Brought forward	frs.	18,783 40
25.	To J. Barbe, his ac		1,979 25
	To do. do. for postages		19 85
	To r'ce to Baring Bro's & Co., £636 66 c 25, 20½ and ⅛ per ct.		16,038 50
26.	To r'ce to Baring Bro's & Co., £600 00 c 25, 17½, and ⅛ per ct.		15,123 00
	Postages on do.		5 60
	Boucher, painter		55 30
	Louis, for sand		4 00
	Channel, bootmaker for Sam'l Spaight		11 00
	Hagenon & Powell, stevedores		722 800
		frs.	52,742 70

	27.	To cash to capt'n, frs. 200		300 00
	28.	To cash do. 100		
				$53,042 70
		By amt. of inward freight ac., frs.	74,838 90	
		To amt. of ship's ac. on leaving Havre	53,042 70	
Nov.	20.	To r'ce to Baring Bros & Co., £450	11,344 50	
		To postage on do	2 90	
Dec.	19.	To J. Barb as per annexed ac ..	6,209 70	
				70,599 80
141		To r'ce to Baring Bros. & Co., £167 11–00 c. 25, 25 and ⅛ ac.	4,235 95	
		Postage on re'ce	3 15	
			4,239 10	
				74,838 90

E. & O. E.

J. BARBE, *Havre.*

I certify this copy to be a true copy of J. Barbe's books.
Havre, 13th Feb'y, 1865.
[SEAL.] TH. MOUSSET.

At the execution of a commission for the examination of witnesses between Oliver Moses and others, libellants, ag't James R. Boyd, and others, respondents, this paper writing was produced and shown to Theodore Mousset, and by him deposed unto at the time of the examination.

Before—

142 JAMES O. PUTNAM.
CICERO BROWN,
Commissioners.

143 U. S. CONSULATE, *Havre, February, 22d,* 1865.

I hereby certify this document to be a true copy of the original on file at this consulate.

[SEAL.] JAMES O. PUTNAM,
U. S. Consul, Havre.

C.

PORT DU HAVRE.

[Consulat des Etats Unis.]
Proves verbal d'expert.

[Consulat des Etats Unis.]

Proces verbal d'expertise.

No. —.
Navire—Robert Cushman.
Capitaine—Otis.
Venant de New York.

JAMES O. PUTNAM.
CICERO BROWN,
Commissioners.

Nous soussigne, J. M. le Tellier, expert jure pres le tribunal de commerce, nomme par M le consul des Etats Unis pour le Havre, et son district, residant en ladite ville, suivant mission en date du 22 Septembre, 1862, afin d'assister au dechargement de la cargaison du navire American, Robert Cushman capitaine Otis, constater, s'il y a lien, l'arrimage, atteintage, grenier, garniture de marchandises composant sou chargement; constater aussi les avaries qu'el purvent arriv essunvees, et autant que possible, en indiquer la cause, et du tout dresser proces-verbal pour le deposer avec le presente mission, en su chancellerie, aussitot le dechargement du navire effectue.

Nous nous sommes transporte ce jour, 22 Septembre, a 2 heures de relevee, 1862, a bord du dit navire, porte et amarre dans le bassin de l'Eure, cote ouest, la capitaine present, nous avons procede indiquer si sur le pont, dans les roufles, chambres ou dunettes et la marque mis pour les distinguer, la l'ouverture des ecoutilles, que
144 nous avons trouvees bien fermees et recouventes de bins prelante. Ayant ete requis pour constater l'arrimage des marchandises composant la cargaison, au fur et a mesure de leur debarquement nous avons reconnu et constatons; que l'arrimage du chargement tant dans l'entrepont que dans la cale etait bien fait et selon les prescriptions du reglement d'arrimage en vigueur au port du Havre sauf a l'egard de soixante-huit sacs de ble a la marque [I] qui se trouvaient dans l'entrepont sur l'avant de la grande ecoutille et en contact avec des futs de sain-doux ce qui constitue un mauvais arrimage. Nous avon egalement constate que les futs de sain-doux plus ou moins vidange ou vides avec marques plus ou moins lisibles portes d'autre part et aient bien arrimees et que la coulage ou vidange des dits futs n'est pureme que de leur manque de serres ce que constitue un vice propre de la chose. Dans la cale comme dans l'entrepont (sauf les soixante-huit sacs de ble en contact avec les futs et reconnu mauvais arrimage,) les futs de sain-doux se trouvaient arrimes devant et derriere separes des bles par des cloisins et garnitures plus que suffisantes pour empecher tout contact entre le futs et les bles, aussi, les sacs de bles et autres marchandises arrimes dans la cale n'ont ils ete avaries que par suite du coulage de sain-doux qui s'est infiltre dans la cale par les coutures des boidages, par les gattes et contre gattes de l'entrepont, la calfatage du dit entrepont a ete reconnu par nous avoir ete bien fait; nous avons egalement reconnu des orgues tant d'un bord que de l'autre et les ecoutilles
145 hermetiquement fermees et calfatees d'ou il resulte que les dites avaries sont survenues par suite des fatigues brusques mouvements que la navire a eprouves dans sa travansee, ce qui constitue des avaries par fortune de mer: mais il n'en est de meme pour les douvelles qui formaient grenier tant dans l'entrepont que dans la cale et qui sont plus ou moins impregnees des sain-doux leur contact avec les futs constitue un mauvais arrimage.

146

147 *Designation des merchandises avaries.*

Marques.		Plus ou moins vidange.	Vides.
A B	Trente-trois futs sain-doux ..... ei	25	8
[H] C	Quatorze....do....do.....	14	0
S S	Quatre.....do....do.....	4	0
Y | P	Cinq .....do....do.....	4	1
W & M	Quarante-un.do.....do.....	41	0
[U]	Vingt .. ....do.....do.....	19	1
F P	Trois .....do.....do.....	3	0
[V]	Douze .....do.....do.....	12	0
H & C	Trois .....do....do.....	3	0
[L] H	Quarante-cinq futs sain-doux.....	35	10
C A D	Dix-sept.....do....do.....	17	0
H & S	Deux.....do....do.....	2	0
[L D]	Trente-trois...do....do.....	28	5
[L] D	Cinq.....do....do.....	4	1
[L] C	Quatre.....do....do.....	4	0
S P B	Un .....do....do.....	1	0
S | marques.	Cent-onze* ....do....do.....	111	0
	a	327	26
	Emsemble trois cent cinquante-trois futs sain-doux en vidanges ou vides par vice propre.		
[M]	Mille deux cents sacs de ble .....a	1,200	00
C A	Six cents.....do ....do.....	600	00
G	Mille cent .....do ....do.....	1,100	00
T	Cent-soixante dix sacs de ble.....	170	00
		3,070	00
	Ensemble trois mille soixante dix sacs de ble avaries par fortune de mer.		
A	Vingt huit sacs de cacao avaries par fortune de mer.		
[ ]	Douvelles cinq mille quatre cents impregnees de sain-doux par suite de mauvais arrimage.		

* Cent onze futs de sain-doux plus ou moines vidange sur les quels il nous a ete impossible de lire les marques que ont du etre effacees par le contact exterieur de sain-doux.

Le dechargement du navire termine le 7 Octobre, 1862, a 6 heures du soir.

148 Cojour o'hui 8 courant nous avons signe le present proces. Verbal pour etre depose au consulat des Etats Unis d'Amerique, ou messieurs reclamateurs pourrent en prendre connaissance.

Havre, le 8 Octobre, 1862.

(Signe) LE TELLIER.

At the execution of a commission for the examination of witnesses between Oliver Moses and others, libellants, ag't James R. Boyd

and others, respondents, this paper writing was produced and shown to J. M. Le Tellier, and by him deposed unto at the time of the examination.

LE TELLIER.

Before—

JAMES O. PUTNAM,
CICERO BROWN,
Commissioners.

Which we certify to be a true copy thereof.

Endorsed:

17,542. United States district court, southern district of New York. Oliver Moses, and others, libellants, *vs.* James R. Boyd, and others, respondents. Commission on part of resp'd'ts. Filed March 10, 1865.

Let the within commission be opened and filed. N. Y., March 10, 1865. (Signed) Sam'l R. Betts. Entered order to open and file.

149 U. S. district court.

OLIVER MOSES, *et als,*
vs.
JAMES R. BOYD, *et als.*

It is hereby consented that James Lincoln be examined, de bene esse, in this cause as a witness on the part of the libellants, at the office of Owen, Gray & Owen, attorneys for said libellants, No. 72 Wall street, on Saturday, the 2d day of May, 1863, at 12 o'clock, at noon of that day, that the deposition of said witness, when sworn to before a notary public, may be read in evidence on the trial of this cause, with like effect, subject to all legal exceptions, as if it had been regularly taken before a justice of this court, under an order issued for that purpose; that the same need not be filed, but may remain in the possession of the libellants' attorneys, a copy being furnished to or allowed to be taken by the respondents' attorneys.

New York, May 1st, 1863.

BENEDICT, BUN & BENEDICT,
Proct's for Resp'ts.

Endorsed:

U. S. district court. Oliver Moses, *et al, vs.* James R. Boyd, *et als.* Consent, d. b. e., to examine.

150

151 U. S. district court.

OLIVER MOSES, *et al,*
vs.
JAMES R. BOYD, *et al.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James Lincoln, being duly sworn and examined, de bene esse, as a witness on the part of the libellants in this cause, by consent hereto annexed, deposes and says:

I am twenty-five years old: I reside at Bath, Maine; I am now on my way to Philadelphia, to join the Robert Cushman, now lying in that port, and expect to sail immediately in her on a foreign voyage. I have been mate of different ships for seven years past; I have been mate of the Robert Cushman since May last. I took the berth of 2d mate in her last June; I was aboard on her voyage from this port to Havre in August, 1862; while the cargo was being laden on board in this city the weather was very warm. The lard in the casks appeared to be in a very warm condition when taken aboard. The lard was stowed forward and aft in the lower hold, and forward and aft in the between decks. The grain, which was in bags, was stowed in the central part of the ship, in the lower hold; and,
152 also, in the central part between decks. The vessel sailed from New York about the 17th August last. The weather was very warm on the first part of the passage, say, three-quarters of the passage across; it was warm until we got over on, or near to, the English coast. The forward hatch was opened frequently during the voyage, whenever the weather would permit. When the hatch was opened, there was a great heat arose out of the hatch, which was more than usual, and more than I had ever experienced. I supposed it arose from the heat of the grain and the warm condition of the lard. When the hatch was opened we could see that the lard was warm and leaking badly. I saw the cargo broke out at Havre. When the cargo was taken out of the between decks, these decks were more or less covered with lard; in some places, I should think, it was two inches deep, in a liquid form mostly. The lard was thickest in this state about midships, a little forward, if anything. All the hatches leading from the between decks into the hold were properly caulked and secured before all the cargo was put in between decks. The main hatch, and also the ballast hatch, was caulked by a caulker hired for that purpose in this city.

When the cargo of grain in the lower hold was discharged,
153 it was found to be damaged by lard, which penetrated through the deck; I don't know to what extent.

Ques. What was the condition of the vessel at the time the cargo was shipped in New York?

Ans. She was tight, staunch, and strong; she did not leak on the voyage more than is common for all vessels. I never was on board a vessel having lard before, on a summer voyage.

Ques. From your knowledge and experience, can you state whether or not the lard in the liquid state in which this was, would have penetrated through any decks on such a voyage?

Ans. I think it would have penetrated through any deck, even if newly caulked. That is my opinion. Lard is very penetrating, and the length of the voyage in the present case being over a month, gave great opportunity for it to penetrate the wood, or rather the caulking. I don't know anything about the condition of the caulking between decks. I don't know anything about the extent of the damage to the cargo.

Cross-examined:

I have been connected with the ship since last May. I saw the cargo stowed in New York. There was grain in the between decks;
I don't know that any of that was damaged; I believe there
154 was some of it. Common dunnage was put between the grain and the between decks; about two inches or so thick of the grain in the lower hold; the most of the damage was from the deck down, although some was damaged in the lower tier; it soaked right from deck thro' down.

I don't know the name of the caulker who caulked the hatches; I saw him caulk both hatches.

The bulkhead in which the grain was stowed in the lower hold, was a tight bulkhead; no water came in it so far as I knew. I am not sure that the grain had any damage from the floor of the bin. The bin extended from the forward part of the ballast-hatch to near the booby hatch; should judge perhaps fifty or forty feet perhaps, more or less. The side of the bin is made by strips, say two inches, nailed on the skin, and then the boards nailed on the strips.

I had no charge of discharging of the ship in Havre. A stevedore discharged her, named Hagnean.

Two hatches led down to the grain in the lower hold.

I think staves were put between the lard and the grain in the between decks.

JAMES LINCOLN.

Sworn, May 2d, 1863, before me.
[SEAL.]

FREDERICK BULL,
Notary Public.

155 Endorsed: U. S. district court. Oliver Moses, *et al*, *vs.* James R. Boyd, *et al*. Deposition of James Lincoln, d. b. e., for l'b'ts. Owen, Gray & Owen, lib'l'ts proc's.

156

157 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms in the city of New York, on Thursday the third day of , in the year of our Lord one thousand eight hundred and sixty-six.

Present, the Honorable Samuel R. Betts, district judge.

OLIVER MOSES, *et als*,
vs.
JAMES R. BOYD, *et als*. } 17,452.

This case having been heard on the pleadings and proof, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libel filed in this cause be, and the same is hereby, dismissed, with costs

to be taxed against the libellants. And it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practice of this court, that the stipulators for libellants' costs pay into court the amount of their stipulation, and that the clerk distribute the proceeds in satisfaction of the taxed costs.

SAM. R. BETTS.

158

Endorsed: Vol. 17, No. 452, United States district court for southern district of New York. Oliver Moses, *et als*, *vs.* James R. Boyd, *et als.* Owen, Gray & Owen, p'rs lib'ts; Benedict, Bun & Benedict, proctor for resp'ts. Final decree—libel dismissed with costs. Filed the third day of May, 1866.

159 U. S. district court.

OLIVER MOSES, CHARLES OWEN, GALEN CLAPP, Frank O. More, Galen C. Moses, and Albert Otis, libellants appellants,
vs.
JAMES R. BOYD, JOHN J. BOYD, JR., and Edward H. Hincken, respondents appellees.

GENT: You will please to take notice that the libellants in the above-entitled action hereby appeal from the decree entered in the above cause, to the circuit court of the United States for the southern district of New York, in the second circuit.

Yours, &c., OWEN, GRAY & OWEN,
Lib'ts' Proct's.

Dated New York, May 12th, 1866.

To BENEDICT, BUN & BENEDICT, Esq.
GEORGE F. BETTS, Esq., *Clerk.*

Endorsed: 17,452, U. S. district court. Oliver Moses, *et als*, *vs.* James R. Boyd, *et als.* Notice of appeal. Owen, Gray & Owen, lib'ts proctors. Filed May 12th, 1866.

160

161 U. S. circuit court.

OLIVER MOSES, CHARLES OWEN, GALEN CLAPP, Frank O. More, Galen C. Moses, and Albert Otis,
vs.
JAMES R. BOYD, JOHN J. BOYD, JR., and Edward H. Hincken.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit:

The petition of appeal of the above-named libellants and appellants, respectfully sheweth:

That on or about the 14th day of February, 1863, the above-

named libellants filed their libel in the district court of the United States for the southern district of New York against the above-named respondents, in a cause of action, civil and maritime, for the recovery of an unpaid balance of charter-money, amounting to the sum of seventeen hundred and seventy-nine dollars and twenty-seven cents with interest.

That the respondents duly appeared and filed their answer to the said libel on the 5th day of May, 1863, praying amongst other
162 things, that the said libel might be dismissed.

That such proceedings were thereupon afterwards had in the said action that the same came on to be heard on or about the 16th and 19th days of June, 1865, when, after the reading of the pleadings and taking of same testimony, the proceedings were, by mutual consent of counsel, stayed and postponed to another term of the said court; and that afterwards, and on or about the 21st and 22d days of December, 1865, the cause again came on to be heard upon the pleadings, testimony, and proofs adduced by the respective parties, and due deliberation being thereupon had, the said court afterwards, and on or about the third day of May, 1866, made a decree in said cause, whereby it was ordered, adjudged, and decreed, that the said libel should be, and the same was thereby, dismissed with costs to be taxed against the libellants.

And these appellants are advised and insist that the aforesaid decree is erroneous in deciding that the said libel should be dismissed, inasmuch as the libellants were and should have been decreed to have been entitled to recover from the respondents the amount of charter-money claimed to have been due by their said libel.

163 Wherefore the appellants, for these and other reasons, appeal from the whole of the said decree of the district court, to the said circuit court to be held in this district, and on the said appeal they intend to make further and new allegations in the circuit court, and introduce the same, and new and further proofs.

And they pray that the said decree of the district court, and every part thereof may be reversed with costs, or such decree thereupon be made as shall be just and proper in the premises.

OWEN, GRAY & OWEN,
Proctors for Libell'ts and Appell'ts.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward J. Owen, being sworn, says that he did, on the 24th day of May, 1866, serve the within petition of appeal upon Benedict, Bun & Benedict, esqs., proctors for claimants and appellees, by serving the same upon a clerk in the office of said attorneys, at their office, No. 76, Wall street, New York.

EDWARD J. OWEN.

Sworn to before me, May 24th, 1866.
[SEAL.] WM. D. JONES,
Notary Public, N. Y. County.

164 Endorsed:

17, 452. U. S. circuit court. Oliver Moses et als. vs. James R. Boyd et als. Petition of appeal. Owen, Gray & Owen, proctors for app'l'ts.

Filed May 24th, 1866.

165 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

OLIVER MOSES, CHARLES OWEN. GALEN, CLAPP, Frank O. More, Galen C. Moses & Albert Otis, libellants, appellants,
vs.
JAMES R. BOYD, JOHN J. BOYD, JR., AND EDward H. Hincken, respondents, appellees.
} Bond for costs.

Know all men by these presents, that we, Oliver Moses, in behalf of himself and other libellants, above named, by E. J. Owen, their attorney, and Henry E. Nesmith, are held and firmly bound unto the above-named respondents and appellees in the sum of two hundred and fifty dollars, to be paid to the said respondents for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the fourth day of June, in the year of our Lord one thousand eight hundred and sixty-six.

Whereas, the above-named libellants have prosecuted an appeal to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above entitled suit, by the judge of the district court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such, that if the above named libellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

OLIVER MOSES, [L. S.]
In behalf of himself and others,
By E. J. OWEN, *Att'y.*
H. E. NESMITH. [L. S.]

Sealed and delivered, and taken and acknowledged this 4th day of June, 1866, before me,

JOHN A. OSBORN,
U. S. Comm'r.

166 UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Henry E. Nesmith, being duly sworn, deposes and says that he resides in the eastern district of New York, and that he is worth the

sum of five hundred dollars, over and above all his just debts and liabilities.

HENRY E. NESMITH.

Sworn to this 4th day of June, A. D. 1866, before me,
JOHN A. OSBORN,
U. S. Comm'r.

Endorsed :

Vol. 17, page 452. U. S. circuit court. Oliver Moses and others, libell'ts and appell'ts *vs.* James R. Boyd and others, resp'd'ts, appellees. Bond for costs on appeal. Owen, Gray & Owen, lib'ts, and app'l'ts, proctors.

Filed this 4th day of June, 1866.

167 To the Honorable Samuel Nelson, judge of the circuit court of the United States for the southern district of New York.

The libel and complaint of Oliver Mosses, Charles Owen, Galen Clapp, Frank O. Moses, Galen C. Moses, and Albert Otis owners of the ship "Robert Cushman" against James R. Boyd, John J. Boyd, jr., and Edward H. Hincklen, of the city of New York, in a cause of contract, civil and maritime, as amended in this court, after appeal from the district court, alleges as follows:

First. That heretofore, and on or about the 24th day of July, in the year 1862, the said ship Robert Cushman, being in the port of New York, the libellants, by their agent, in that behalf duly authorized, made and concluded, with the respondents, a charter-party, bearing date the day and year last aforesaid, by which the libellants for and in consideration of the covenants and agreements therein contained to be kept and performed by the respondents,
168 covenanted and agreed to the freighting and chartering of the whole of the said ship or vessel, (with the exception of the deck, cabin, and necessary room for the crew and stowage of provisions, sails, and cables,) or sufficient room for the cargo therein mentioned, unto the respondents for a voyage from the port of New York to Havre, on the terms in said charter contained; that is to say, that the said vessel should be tight, staunch, strong, and every way fitted for the said voyage, and should receive on board, during the same, the merchandise therein mentioned, and that no goods or merchandise should be laden on board otherwise than from the said respondents or their agent.

And it was agreed in and by the said charter party, by and on behalf of the respondents, that they would provide and furnish to the said ship or vessel, at New York, a cargo of lawful merchandise, to be loaded under inspection, and that they would give sufficient weight to load the said vessel to the draft of water allowed
169 by inspectors of vessels, and that all grain should be laden in the bags of the shippers thereof.

And the respondents further agreed that they would pay for the

use of the said ship or vessel during the said voyage the sum of twenty-four cents per bushel of wheat, of sixty pounds for each and every bushel, and a fully equivalent freight for all other merchandise laden on board together with five per cent. primage, and that such charter money should be payable on the discharge of the cargo, at an exchange of 5.25 to the dollar.

And it was further agreed in and by the said charter party, that the lay days for loading and discharging, should commence from the time the captain of the said vessel reported himself ready to receive or discharge cargo, and be twenty-five running days in New York for loading and dispatch in discharging the cargo, and that for each and every day's detention by default of the respondents or their agents, one hundred silver dollars per day, day by day, should be paid
170 by the respondents to the libellants; that the cargo or cargoes should be received and delivered alongside the vessel within reach of her tackles at ports of loading and discharging.

That the ship should go consigned to charterers' friends, paying two per cent. commission, and that the ship should pay brokerages and one and a quarter per cent. commission to the respondents; and the said parties bound themselves to the true and faithful performance of the said charter, in the penal sum of fifteen thousand dollars, as by the said charter party, ready to be produced as this court may direct, will at large and more fully appear.

Second. And the libellants further allege that the respondents afterwards procured and sent to the said vessel, to be received on board and transported thereon, on the voyage aforesaid, a large quantity of wheat, lard, and other merchandise, which was received and properly stowed in the lower hold until the same was filled; that after the lower hold had been so filled as aforesaid, other
171 large quantities of lard was sent to the vessel by the respondents to be shipped thereon, but there was then no room or place left to stow or carry the same, except upon the between decks over the grain below; that the weather was at the time extremely warm, and the casks containing the said lard leaked badly, and the lard itself was in a fluid state; that to store the said lard, under such circumstances, upon the between decks, was to endanger the grain below, and it would have been bad stowage, and accordingly the master then in charge of the said vessel refused to receive the said lard and to incur the risk of damaging the other cargo; that thereupon, in consideration of the premises and in order to induce the master to take the said lard, the respondents executed and delivered to him an agreement or undertaking in the words and figures following; "New York, Aug. 7, 1862. Capt. Otis, ship Robert Cushman: Dear sir: We understand that you object to our shipping lard in the between decks of your ship. We ask you to have all the lard
172 received, and we agree to pay any damage that yourself or the ship may be subject to, on the discharge of the cargo at Havre, the said damage arising from the lard being stowed in the between decks and running in, to other cargo either in the between decks or lower hold. Yours, truly, Boyd & Hincken.

That thereupon, in consideration of such agreement of the respondents, the master waived his objections and covenanted to receive, and did receive, stow and transport, the last aforesaid lard in the between decks of the said vessel, and the libellants that insist, by reason of the premises, the respondents are estopped from alleging or proving that the loss or damage hereafter mentioned was caused by any defect in the condition of the said between decks, or that it would have been good stowage to have stowed the said lard thereon over the grain in the lower hold, or that the libellants were bound to have received and carried the said lard thereon without requiring the aforesaid agreement in that behalf.

173 Third. That after the said vessel was so loaded as aforesaid, and before sailing on her said voyage the amount of freight money which would become due under the said charter party, upon the delivery of the said cargo, was adjusted by and between the master and the said respondents, at the sum of fourteen thousand seven hundred and ten dollars, and an endorsement to that effect was made upon the said charter party.

That the said vessel afterwards, and on about the 17th day of August, 1862, set sail and departed on her aforesaid voyage to Havre, where she afterwards and on or about the 23d day of September thereafter duly arrived with said cargo; that upon such arrival the master of the said vessel by the order and direction of the said charterers, consigned the same to their friends and agents, J. Barbe & Co., and delivered to them the bills of lading to enable them to collect the freight money due and payable thereby.

That the said J. Barbe & Co. collected and received all of the freight money due and payable under the said bills of lading
174 (and which exceeded the amount payable under the charter) for the use and benefit of the respondents, and not as the agents of or for the use of the libellants.

Fourth. That after having duly delivered the cargo at Havre, the master by the direction of the said respondents, called upon the said J. Barbe & Co., and requested them to pay to him the amount due and payable under the charter, as aforesaid, and although they paid a portion thereof, yet they refused to pay and would not pay the entire sum, but left unpaid the sum of $1,779 27, which the respondents have been requested to pay but which they have hitherto neglected and refused to do.

That the said respondents set up and pretend, by way of excuse and justification for their refusal to pay the balance, that they, by their agent, J. Barbe & Co., had paid to the consignees and owners of the wheat which had been stowed in the lower hold and in the between decks, for damages thereto, a sum equal in amount to the balance
175 remaining unpaid, but the libellants aver, that whatever sum, if anything was so paid, the same was by them paid for the damages occasioned by stowing the lard in the between decks, as above stated, and the risk and expense of which they, by their aforesaid agreement, had assumed and agreed to pay, and which, as between the respondent and the libellants, they are bound to pay and satisfy

out of their own funds, and that the amount so paid by them, if anything is not in anywise a proper set off against, or abatement of, the amount payable under the aforesaid charter party.

That although the libellants have in all things well and truly kept and performed all and singular the covenants and agreements in the said charter party contained, on their part, yet the respondents have failed to perform the same on their part. That at the time of filing the libel in the district court, to wit, on the 14th Feb'y, 1863, there was due and owing to the libellants for the charter or freight money aforesaid, a balance of seventeen hundred and seventy-
176 nine dollars and twenty-seven cents, as above stated, which is still due with interest.

Sixth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and this honorable court.

Wherefore, the libellants pray that a citation according to the practice of this court in like cases may issue against the said defendants, and they be cited to appear and answer upon oath all and singular the matters herein particularly propounded and set forth, and that this honorable court would be pleased to decree the payment of the amount so due, as aforesaid, with interest, and their costs, and that they may have such other and further relief as in law and justice they are entitled to receive.

OLIVER MOSSES *et al.*,
Pr. E. J. OWEN, *Att'y.*

OWEN, GRAY & OWEN,
Lib'l'ts Proctor.
EDWARD H. OWEN,
Advocate.

177 SOUTHERN DIST. OF NEW YORK, *ss.:*

Edward J. Owen, being duly sworn, says, that he is one of the proctors for the libellants in the foregoing libel named.

That said libellants are not, nor is either of them at present within this district, as deponent is informed and believes.

That said libel is true to the best of deponent's knowledge, information, and belief.

EDWARD J. OWEN.

Sworn to before me, Aug. 20, 1866.
[SEAL.] JOHN J. RICE, *N. Y. Com.*

Endorsed: U. S. circ't court. Oliver Mosses and als., lib'l'nts and appellants, vs. James B. Boyd and als., appellees. Amended libel after appeal to the circuit. Owen, Gray & Owen, lib'l't proctor. Filed Aug. 20, '66.

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179 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this 17th day of August, in the year of our Lord one thousand eight hundred and sixty-six, I, Charles W. Newton, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled 'An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,' passed March 1st, 1817, and the act entitled 'An act to establish the judicial courts of the United States,' passed September 24, 1789," did call and cause to be and personally appear before me, at my office, at No. 74 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, William M. Otis to testify and the truth to say, on the part and behalf of the libellants and appellants in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the southern district of New York, wherein Oliver Moses *et al*, are libellants and appellants, *vs.* James R. Boyd, respondent and appellee.

And the said William M. Otis, being about the age of fifty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Wm. M. Otis, and he did thereupon depose, testify, and say as follows, viz: I reside in Brunswick, Maine. I am a seafaring man, and expect to go to sea as soon as loaded. I am now loading my vessel at this port. I have been examined as witness by deposition in this cause, and was not present upon the trial of this action.

Q. State whether or not, subsequent to the execution of the agreement by Boyd & Hincken, or guarantee signed by them, Ed-
180 ward Hincken at any time called your attention to the stowage
181 between decks on the ship Robert Cushman?
(Obj.)

A. No, sir.

Q. State whether or not, subsequent to that time, the said Hincken objected to the stowage in any way or manner?

A. No, sir.

Q. State whether or not, subsequent to that time, you ever promised him that such such stowage should be remedied?

(Obj.)

A. No, sir.

Q. State whether or not, subsequent to the said time, he ever told you that you had his guarantee against the stowage of the lard, and

that you were stowing it badly, and that he would not be responsible under his guarantee?

(Obj.)

A. No, sir.

Q. State whether or not you ever promised him that such stowage should be remedied?

(Obj.)

A. No, sir.

Q. State whether or not you ever told the said Hincken that you would not have exacted a guarantee from him if your between

182 decks had been caulked, or that your between decks were open, and that that was the reason you exacted the guarantee from him?

(Obj.)

A. No, sir.

Q. The testimony of Edward Hincken, taken on the trial of this action, having been read to the witness, as to a conversation between said Hincken and the witness occurring subsequent to the guarantee? (Appellee's counsel objecting to the reading of the same, witness is asked:)

Q. Whether or not such conversation ever took place at the time referred to, or at any other time?

(Obj.)

A. No, sir.

Cross-examined by R. L. Benedict, esq., counsel for appellees.

Q. Was there not some of the grain, in the after part of the midships, stowed against tallow or against lard?

A. There was, with the bulkhead boards and staves between.

Q. Was not some of the grain injured by such stowage?

(Obj. to by libellant's counsel.)

183 A. I don't know anything about it, because I did not go in the ship; I was not one of the owners of the ship.

Q. Did not Mr. Hincken object to that mode of stowage of this grain?

A. No, sir.

Q. Do you not know, or have you not been told by the owners of the vessel, or some of them, that injury resulted to the cargo from such stowage, which the ship paid?

A. Not from the stowage between decks, as to the grain and lard being stowed between decks together.

Q. Don't you know, or have you not been told by some one of the owners, that there was another claim made for damage to this cargo beside the one in controversy in this suit?

A. I never heard of any other than the one embraced in this suit.

WM. M. OTIS.

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185 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, Charles W. Newton, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the act of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness testimony is material and necessary for libellants and appellants in the cause of action mentioned in the caption hereof, and that the witness live at a greater distance from the place of trial of said cause than one hundred miles, and that said deposition is taken under the rules and practice of this court, for the purpose of being read as evidence on the hearing of this cause, on appeal, in this court.

I further certify, that a notification of the time and place of taking the said deposition, signed by me, was made out and served on the counsel and proctors for appellees to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit.

I further certify, that on the 17th day of August, A. D. 1866, I was attended by counsel and proctors for respective parties, and by the witness, who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of transmitting the same with my own hand to the court for which the same was taken.

I further certify, that I am not of counsel or attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, this eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States the ninety-first.

(Copy.)

CHAS. W. NEWTON,
U. S. Commsssioner, Circuit Court of the U. S. for the Southern District of New York.

186 Endorsed: U. S. circuit court, southern district of New York. Oliver Moses et al., appellants, *vs.* James R. Boyd, appellee. Copy deposition de bene esse for appellants, taken before me this 17th day of August, 1866. Chas. W. Newton, U. S. com'r. Filed Aug. 27, '66.

187 To the Honorable Samuel Nelson, judge of the circuit court of the United States for the southern dist. of New York.

The exceptions and answer of James T. Boyd, John J. Boyd, and Edward Hincken to the libel and complaint of Oliver Mosses, Charles Owen, Galen Clapp, Frank O. Moses, Galen C. Mosses, and Albert Otis alleges as follows:

Exceptions.

These defendants except to the said libel, filed in this court, for this:

First. That it introduces in a cause, on appeal in this court, a new cause of action not in the libel in the district court—that is to say, the cause of action springing out of the paper writing set forth in the second article of said libel, and purporting to be signed Boyd & Hincken, being an agreement to pay any damages which Captain Otis, or the ship, might be subject to in consequence of the lard being stowed in the between-decks and running into other cargo, which is a new cause of action founded on said paper writing, and not
188 on the charter-party, and different from the original cause of action founded on the charter party; and this court, sitting in admiralty, has no original, but only appellate jurisdiction.

Second. That the cause of action founded on the paper writing set forth in the second article of the libel, and purporting to be signed by Boyd & Hincken, is not a cause of action cognizable in admiralty, the same not being maritime in its character, but being simply a common law undertaking in the nature of a guarantee against the damages, or a promise to pay the damages, if any, which should be recoverable against said ship, or her master, Captain Otis, for damage to cargo by negligence, is a cause of action cognizable at common law only, and not in admiralty, and was not within the jurisdiction of the district court in admiralty, nor is it within the jurisdiction of this court in admiralty.

And for answer to said libel, without prejudice to said exceptions, these respondents answer:

First. These respondents admit that on or about the 24th
189 day of July, 1862, they made a written charter-party of the said Robert Cushman, to which, for the contents thereof, these respondents refer, and they deny all allegations of the libel inconsistent therewith.

Second. These respondents deny, that the said charter-party was duly performed by the said ship and the master and owners thereof, but, on the contrary, they allege that, although said vessel was represented as sound, tight, and staunch, and covenanted so to be, and relying on the said representation and covenant, and believing the same, proceeded to load said vessel, yet the said vessel was not sound, tight, and staunch, and on said voyage proved to be not tight, but leaky in her decks; that her decks were not properly caulked, and were leaky; that her hatches were not properly fastened and

caulked; and that the said vessel was in other respects unfit for the transportation of the cargo duly laden on board, by reason whereof the said cargo received serious injury and damage, to an amount exceeding the claim of the libellants.

Third. These respondents also allege, that the said cargo,
190 laden on board said vessel under said charty-party, was not properly dunnaged and not properly stowed and cared for by the persons in charge of said vessel, and that by reason of improper stowage a considerable portion of said cargo was greatly injured and damaged, and the same not duly delivered as required by the contract.

Fourth. These respondents further allege, that the cargo laden on board said vessel was consigned to various parties in Havre, and that the bills of lading therefor were executed by the said master, according to which the freight, amounting to much more than the charter money, was to be paid; that it was agreed between the parties that on bills of lading to be retained by the master and owners of said vessel for the collection of the freight, the said freight should be collected by them, and be by them applied to the payment of the charter-money, which was payable on the discharge of the cargo in Havre aforesaid, and the balance was to be paid to these respond-
191 ents, and by virtue thereof the amount of freight on said cargo was collected and received by said master or owners, or their agents, or the assignees of said vessel to whom she was consigned in Havre by the said master, and the same amounted to more than sufficient to discharge the whole amount agreed to be paid by the said charter-party for the charter and hire of said vessel, and the amount stipulated by said charter party to be paid has been paid and satisfied, by reason of the premises, and no sum whatever is due the libellants upon said charter-party.

Fifth. That in law and commercial usage lard is a usual and lawful article of commerce between New York and Havre, and lawful merchandise within the meaning of said charter party and these defendants and other shippers by said ship were entitled to ship lard as lawful cargo and lawful merchandise in said ship.

That these defendants chartered said ship at the price mentioned in said charter party, as a general ship, with the purpose and
192 on the consideration that they were authorized to ship and to accept from various outside shippers lard as well as other lawful merchandise, and that the ship was in condition to stow and carry the same safely, otherwise they, these respondents, might have sustained great loss by chartering said ship at the rates provided in said charter party. And it was the duty of the libellants under the said charter party to have the decks thereof, as well as the sides and hatches, caulked so as to be tight and safe for the carrying of lard as well as other lawful merchandise, and to have the whole of said vessel tight, staunch, strong, and every way fitted for said voyage, and to receive on board all the cargo of lawful merchandise, which these respondents should lawfully send to be shipped on board; and the agreement in said paper writing was without any considera-

tion, and it was the duty of the owners of said ship so to protect and stow said cargo that one part thereof should not injure another
193 part, and if they failed to do so, it was negligence on their part, for which they were justly responsible, and for said negligence and responsibility said agreement was not intended to offer, and did not offer, any guaranty or indemnity. And they deny that by any agreement they assumed or agreed to pay the damages which might be occasioned by said lard, or by the leaky condition of said ship.

Sixth. That they signed the agreement set forth in the second article of the said libel with the full understanding that the said vessel was sound, tight and staunch as she had been, knowingly, falsely represented by said master to be, and knowingly covenanted in and by said charter to be, and that said agreement as between the parties is to be construed as subject to the condition that said vessel was in all respects sound, tight and staunch as she had been so represented to be, and was so in and by the charter party covenanted to be, and that as between the parties, under the circumstances, these respondents were not estopped in law or in fact from setting up their
194 just defence against the said false and fraudulent representation, and covenant as to the tightness, soundness and staunchness of said vessel, and her fitness to carry lawful and usual cargoes on the voyage described in such charter party.

Seventh. That said agreement was void, and not obligatory upon these respondents, for the reason that the same was wholly without consideration, and for the reason that it was obtained from these defendants by the concealing of the true and suggesting of a false condition of the ship and cargo.

Eighth. That in and by the said charter party it was agreed that the master of the said ship, on arriving at Havre, should consign her there to merchants, in whom these defendants had confidence, and who were friends of these defendants, not only that they might be secure in the receipt of their freight, and also might confer a favor on their friends by directing business to their said friends, on which they would earn commissions, and accordingly said charter
195 party contained a provision that the said ship should go consigned to charterers friends, paying two per cent. commission, words of frequent and common use in commerce, and which have a well-knowing signification in commerce, to wit: that the agent of the ship at the end of the voyage shall be a person named by the charterer, not his agent, but simply his commercial friend, that in performance of such provision these defendants named J. Barbe, of Havre, a well-known and highly respectable and responsible house in Havre, commercial friends of these defendants, as the person to whom they desired said ship to be consigned, and she was accordingly consigned by the master to said J. Barbe, as consignee of said ship, not as agents of the defendants, as the agents of the ship and master in Havre they transacted all the business of the ship, making her collections and paying her disbursements, and as such collected the freights, amounting to fifteen thousand two hundred

and twelve dollars and four cents, from which they retained the whole amount of the charter-money, being fourteen thousand
196 seven hundred and ten dollars, for the use of said ship, to whose account the same was credited by them, and credited the balance to these defendants, to whom these same belonged by said charter party.

Ninth. That on the discharge of the cargo a considerable portion was found to have sustained damages by the negligent stowage and transportation of the libellants, for which damage the said ship and master were justly and legally responsible, and were so held and decreed to be by the French tribunals in suits brought against the said ship and master, or one of them, to recover such damage, to which suits these defendants were not parties, and of which they had no notice, and for the causes of action in which these defendants were not responsible. And this suit is brought to recover from these defendants on said agreement a guaranty the amounts which the libellants had been so compelled to pay by reason of their own negligence.

Tenth. That all the cargo was shipped under bills of lading
197 signed by the master of said vessel, by which the cargo was to be delivered only on payment of the freight to the said master, who by himself or his agent was alone authorized to collect the said freight. And the said bills of lading were, as is the usual practice in commerce, signed in duplicate, one of which is delivered by the master to the shipper, on which to demand his goods, and the other retained by the master, on which to demand his freight. And the bills of lading delivered by the master to J. Barbe were the master's bill of lading to enable them, said J. Barbe as agents for the master, to collect the freight, and the same was so collected by said Barbe, as agent for the libellants, and not as the agent for these defendants. And these defendants deny that said house of J. Barbe or said J. Barbe was or acted as agent for these defendants as consignee of said vessel, or in collecting said freight from the consignees, of the goods, or in paying the damages recovered by the consignee against the said ship or master, or both of them, and they deny
198 that he was their agent for any purpose whatever connected with said vessel and cargo, except to retain and remit to these defendants the balance of freight over and above fourteen thousand seven hundred and ten dollars, the agreed amount of charter-money endorsed on said charter party, and these defendants did not give any directions as to the consignment of said vessel to J. Barbe, or J. Barbe & Co., except as aforesaid, and so far as said libel differs from this answer, these defendants deny the statements of said libel.

Wherefore, the respondents pray that the libel may be dismissed with costs.

EDW. HINCKEN.

Sworn to before me this 5 day of October, 1866.

[SEAL.]

W. D. JONES,
Notary Public N. Y. Co.

Endorsed:

U. S. circ't court, southern dist. Oliver Moses, et al., *vs.* Jas. T. Boyd, et al. Answer. Benedict, Tray, and Benedict. Filed Oct. 6, '66.

199 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Saturday, the 24th day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-six.

Present: The Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

OLIVER MOSSES, and *als*, lib'ts and app'l'ts,
vs.
JAMES R. BOYD, and *als*, resp'd'ts and appellees.

The appeal from the district court in this case coming on to be heard,

Mr. Owen reads testimony from the Apostles, and argues on part of app'l'nts.

Mr. Benedict reads testimony from the Apostles, and argues on part of appellees.

Cur adv vult.

200

201 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Thursday, the 13th day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-six.

Present: The Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

OLIVER MOSSES, CHARLES OWEN, GALEN Clapp, Frank O. Moore, Galen C. Mosses, and Albert Otis,
vs.
JAMES R. BOYD, JOHN J. BOYD, jr., and Edw'd H. Hincken.

The appeal of the libellants in this cause coming on to be heard, after hearing, E. H. Owen, advocate for the said libellants and appellants, and E. C. Benedict, esq., advocate for the respondents; and, after due deliberation thereon, it is now ordered, adjudged, and decreed that the decree of the district court of the United States for the southern district of New York, made and entered in this cause on the third day of May, 1866, dismissing the libel herein, with costs, be, and the same is, hereby reversed.

And it is further ordered, adjudged, and decreed, that the said

libellants and appellants do recover against the respondents
202 the sum of one thousand seven hundred and seventy-nine dollars and twenty-seven cents, balance of freight money in the pleadings mentioned, with interest thereon at the rate of seven per cent. per annum from the twentieth day of Nov'r, 1862, until the date of this decree, amounting to the sum of two thousand two hundred and eighty-five dollars and forty cents; and, also, their costs in the said district court, taxed at two hundred and forty-five 91-100 dollars, and in this court taxed at one hundred and seventy 25-100 dollars, which said principal, interest, and costs amount to the sum of two thousand seven hundred and one 56-100 doll's.

And it is further ordered, adjudged, and decreed, that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practice of this court, or the said last-mentioned sum, with interest thereon from the date hereof be paid, the libellants and appellants do have an execution to collect the same according to law, and the course and practice of this court.

203 U. S. Circuit Court.

OLIVER MOSSES, CHARLES OWEN, FRANK O. More, Galen C. Moses, and Albert Otis, liblnts and appllees,
agst.
JAMES R. BOYD, JOHN J. BOYD jr., and Edward H. Hincken, respdts. and appellnts.

To the honorable, the Supreme Court of the United States:

The appeal of James R. Boyd, John J. Boyd, jr., and Edward H. Hincken, respdts. and appellants, respectfully shows:

That on or about the 14th day of Feb., 1863, the above-named libellants and appellees, filed their libel in the district court of the United States for the southern district of New York, against the above-named respondents and appellants, in a cause civil and maritime, for the recovery of an alleged unpaid balance of charter money.

204 That these respondents and appellants duly appeared in said cause and filed their answer to said libel, praying that the same might be dismissed, and such proceedings were thereupon had that by the final decree made and pronounced by the said district court, on the 3d day of May, 1866, it was ordered, adjudged, and decreed, that the said libel be dismissed with costs.

That thereafter the said libellant and appellees duly appealed from such final decree to the circuit court of the United States, for the southern district of New York, and the said cause was removed thereby into the said circuit court.

That thereafter the said libellantss and appellees duly filed an amended libel in said circuit court, and the respondents duly filed heir answer thereto.

That said cause was in said circuit court tried anew, and such proceedings were thereupon had in the said circuit court, that afterwards, on the 13th day of Dec'r, 1866, the said circuit court made a final decree in said cause, whereby it was decreed, that the
205 decree of the said district court be reversed, and that the libellants and appellees do recover against the respondents and appellants the sum of two thousand seven hundred and one dollars and fifty-six cents, and that they have execution therefor according to law and the course and practice of said court.

And these appellants are advised that the said decree is erroneous and ought to be reversed.

Wherefore, these appellants appeal from the whole of the said decree of said circuit court to the Supreme Court of the United States, and respectfully pray, that the said decree of the said circuit court and the libel, answer, amended libel, and answer thereto, depositions, evidence, and all proceedings in the said cause may be sent to the Supreme Court of the United States, without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed and a decree made dismissing said libel, with costs, or such other decree made as to the said Supreme Court shall seem just.

206 BENEDICT, BUN & BENEDICT,
Resp'd'ts and Appellant's Proctors.
E. C. BENEDICT, *Advocate.*

Endorsed: U. S. circuit court. James R. Boyd and al., resp'd'ts and appellants, *ads.* Oliver Mosses, lib'l'nts and appellants. Appeal. Benedict, Bun & Benedict, app'l'nt's proctors. E. C. Benedict, advocate. Filed Dec. 28, '66.

207 Circuit Court of the United States of America, for the southern district of New York, in the second circuit.

OLIVER MOSES, et al., libellants and appellees,
vs.
JAMES R. BOYD, appellant.
} Bond for costs.

Know all men by these presents, that we, James R. Boyd, Robert Dillon, and James E. Jenkins, are held and firmly bound unto the above-named libellant and appellees in the sum of five thousand and five hundred dollars, to be paid to the said libellants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 29th day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-six.

Whereas, the above-named James R. Boyd, et al., have prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York.

Now therefore, the condition of this obligation is such, that if the above named appellant shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JAMES R. BOYD.
ROBERT DILLON.
JAMES E. JENKINS.

Sealed and delivered, and taken and acknowledged, this 29 day of Dec'r, 1866, before me.

R. E. STILLWELL,
U. S. Com'r.

208 UNITED STATES OF AMERICA, *southern district of New York, ss:*

Robert Dillon and James E. Jenkins, being duly sworn, depose and say each for himself, that he is worth the sum of eleven thousand dollars, over and above all his just debts and liabilities.

ROBERT DILLON.
JAMES E. JENKINS.

Sworn to this 29th day of Dec., A. D. 1866, before me.

R. E. STILLWELL,
U. S. om'r.

Endorsed: U. circuit court. Oliver Moses, et al., lib'l'ts and ap'p'l'nts, *vs.* James R. Boyd, app'l'nts. Bond for costs on , proctor. Filed this 29th day of Dec'r, 1866.

209 By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit.

To Oliver Moses, Charles Owen, Frank O. More, Galen C. Moses, and Albert Otis.

Whereas, James R. Boyd, John I. Boyd, jr., and Edward Hincken, have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States, for the southern district of New York, in the 2d circuit, made in favor of you, the said Oliver Moses, Charles Owen, Frank O. More, Galen C. Mosses, and Albert Otis, against the said James R. Boyd, John J. Boyd, jr., and Edward Hincken, and have filed the security required by law. You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the first day of March, next, to do and receive what may appertain to justice, to be done in the premises.

Given under my hand at the city of New York, in the
210 southern dist. of New York, the 30th day of Jan'y, 1867.

SAM'L R. BETTs,

Judge of the United States, for the southern dist. N. York.

Endorsed: U. S. circuit court. James R. Boyd, and al., resp'd'ts and appellants, *as.* Oliver Mosses, and al., lib'l'nt and appellees' citation. Benedict, Bun & Benedict, app'l'nt's proctors. We admit personal service of the within citation, same as if the said citation was served on the respondents and appellants personally. Jan'y 20, '67. Owen, Gray & Owen. Filed Jan'y 30,–'67.

Evening Post Steam Presses, cor. Nassau and Liberty Sts., N. Y.

Supreme Court

OF THE UNITED STATES.

Oliver Moses *et al.*,
Lib'ts and Appellees,
ads.
James I. Boyd, *et al.*
Appellants.

Appellees' Statement and Points.

This is an action in *personam*, brought by the libellants against the appellants, to recover a balance due upon a charter party of the ship *Robert Cushman*.

The charter was executed in the City of New York, where the ship lay at the time, and bears date the 24th July, 1862. The voyage was from New York to Havre, with a cargo of merchandize which the charterers agreed to furnish. The charter money was to be paid at Havre on the discharge of the cargo. The ship was to be tight, staunch and strong, and fitted for the voyage. She was to load "under inspection," and "go consigned to the *charterers' friends.*" (Charter *fol.* 53.)

The charterers sent to the ship merchandize consisting of grain in bulk and in bags, lard, &c., which was re-

ceived and stowed in the lower hold until it was filled, (*fol.* 38, 46.) They afterwards sent more lard, which, being in a very warm and leaky condition, and there being no place to stow it except on the between decks, the stevedore refused to receive without the master's consent. The master also rejected it and told the charterers that he would not receive it unless they would give him an agreement to hold the ship harmless. (*fol.* 46, 47, 48)

There was no dispute between the parties in respect to the leaky state and condition of the lard, nor as to the propriety of the master's refusal to receive it, nor was anything said about submitting the question to the inspector under whom the ship was to be loaded, but the charterers, acquiescing in such refusal, wrote to the master a letter dated August 7th, 1862, stating that they had heard of his objection to receiving the lard, requesting to have it received, and agreeing to pay any damages that he or the ship might be subjected to on the discharge of the cargo, "arising from the lard being stowed in the between decks and running on the other cargo, either in the between decks or lower hold." (*Letter, fol.* 57, *test.*, 46, 67.)

Upon this letter, the master consented to take the lard and it was received and stowed in the between decks. There were three or four hundred casks of it which "appeared to be very warm and *like oil.*" (*fol.* 68.) It was all leaking badly from the casks and was "more like oil than lard." (*fol.* 38, 47, 68, 151.) The weather was excessively hot during all the time the ship was receiving cargo, so that the stevedores had to be relieved by extra men, and on some days they could not work at all; and it so continued during the greater part of the voyage. (*fol.* 38, 68, 142.)

The ship was three or four years old, and in all respects staunch, strong and well fitted for the voyage; her between decks were in good condition and suitable to carry any cargo which it was proper to stow thereon over grain below (*fol.* 49, 50, 51, 66, 70.)

The cargo was all properly stowed and dunnaged except 68 bags of wheat in the between decks, which were damaged from bad stowage (*fol.* 128.) The ship paid the damages on that wheat, and no question arises thereon in this case (*fol.* 39).

When the ship was loaded and ready for sea the charterers designated the house of J. Barbe & Co. as their "friends," and desired that the ship might be consigned to them, and they directed the master to call upon them for payment of the charter money, which was adjusted at $14,710. The master also at their request gave them a letter so consigning the ship, which they forwarded to J. Barbe & Co. (*fol.* 57, 75, 76.)

The ship sailed on the 17th August, and arrived at Havre about the 23d September following (*fol.* 66.) The weather continued warm during the greater part of the voyage. The forward hatch was opened as often as the weather would permit, when great heat would come up from below, and the lard appeared to be still leaking badly (*fol.* 68, 152.)

Upon arriving at Havre the master placed the ship as directed in the hands of J. Barbe & Co., and also delivered to them the ship's bills of lading (*fol.* 68, 76, 79.) He then called a survey on the ship and cargo, which was ordered by the American Consul, and was duly held (*fol.* 68, 129.) The surveyors reported that the cargo was all properly stowed and dunnaged, except the 68 bags of wheat above mentioned, and that about 3,000 sacks of wheat were more or less damaged by the lard which had leaked out of the casks, and penetrated into the lower hold (*fol.* 129, 130, 68).

When the cargo was discharged from the between decks, 26 casks were found to be entirely empty, and 327 partly empty; the decks were covered with lard in a *liquid state*, being in some places 2 or 3 inches deep, which had destroyed the pitch on the seams, and rotted the oakum therein (*fol.* 69, 129, 130, 78, 47, 152.)

The freight money under the bills of lading exceeded the amount payable under the charter (*fol.* 117.) It

was all collected and received by J. Barbe & Co. for and on behalf of the charterers. They were not employed by the master to collect it, nor did they in any way account to him therefor. It was the fund from which they were directed to pay the charter money, and they were to account for and pay the balance to the charterers (*fol.* 76, 115). Accordingly, having collected the freight money, the master requested them to pay him the charter money, which they paid in part, but they refused to pay the amount in controversy in this suit under the pretence that the ship, as between her and the charterers, was liable for the damages occasioned by the lard (*fols.* 76, 77).

The libel was dismissed in the District Court, but upon appeal to the Circuit where an amended libel was filed (*fol.* 167), and further testimony taken, (*fol.* 179), the decree of the District Court was reversed, and a decree entered in favor of the libellants for the amount of charter money so withheld, and costs, (*fol.* 201) from which the charterers appealed to this Court.

There is no dispute that the damage in question arose entirely from the lard which was carried on the between decks, melting and running upon the grain, nor as to the amount retained from the charter money to satisfy those damages. The question is, which of the parties should bear the loss. The libellants claim, and so the Circuit Court held, that by the agreement contained in the letter, the charterers were bound to pay the same, and therefore they had no right to retain or apply any of the charter money to that purpose. On the other hand, the charterers claim that such agreement was merely a guarantee, and as such it is void for want of consideration; that if not, still it is one over which the Courts of Admiralty have no jurisdiction. They also claim that the between decks were not properly caulked, and that in consequence thereof the lard penetrated through the seams and caused the damage, which made the ship liable therefor.

POINTS.

First.—The agreement contained in the letter of the 7th of August, should be considered as a modification of the terms of the charter party in respect to the lard in question. It was between the original parties, and related to the same voyage, and to merchandize which had been offered to the ship and rejected on account of its condition. It was not in any sense a guaranty, which is an undertaking by a third party. (*Emerson* v. *Slater*, 22 *How.*, 28, 43.)

Second.—There was a sufficient consideration in the consent of the master to receive the lard to support the agreement. He was not bound to receive it if not in shipping order, which had to be determined not only by its condition but also in reference to the space left in the ship where it had to be carried, if at all. The clause in the charter requiring all lawful merchandize to be received, had no relation to its shipping order and condition, and the master, in the exercise of his lawful authority in the matter, had a perfect right to reject the lard unless the charterers assumed the risk. In refusing to receive it he acted in good faith, not capriciously or fraudulently. His judgment upon the subject, having been reasonably and properly exercised, is entitled to respect and should not be lightly set aside. (*Weston* v. *Foster*, 2 *Curtis C. R.*, 119; *Weston* v. *Minot*, 3 *Woodb. & M.*, 436.)

Third.—When so offered to the ship, the lard was beyond contradiction "more like oil than lard." There

were three or four hundred barrels of it in this condition, leaking badly from the casks (*fols.* 38, 47, 68, 151). The weather was excessively hot, and under all the circumstances, the master had good reason to believe that if shipped in the condition it then was, it would leak out of the casks and lie in a melted state upon the between-decks, and would necessarily penetrate through the seams, however tight they might be, and injure the cargo below, rendering the ship liable on account of bad stowage.

Fourth.—This was in effect conceded by the charterers, otherwise, as it is reasonable to suppose, they would have insisted on the ship's duty to receive the lard and carry it at her own risk; or they would have insisted upon referring the question to the inspector under whose inspection the ship, by the terms of the charter party, was to be loaded. They did neither, but acquiesced in the master's refusal, and at once determined the question by assuming the risk.

Fifth.—Moreover, the propriety of the master's refusal to receive and carry the lard on those decks without such agreement, is fully supported by the testimony.

I. The stevedore, and all who saw the lard say that to have carried it there, would have been bad stowage, even if the decks had been as perfect as possible. The master says it would have penetrated "through the decks of any vessel." (*fols.* 46, 47, 39.)

II. It may be true, as some of the charterers' witnesses say, that vessels may have carried lard on

the between decks over grain or dry cargo below without damaging it; still it is clear from the nature of the case that this cannot be done when the lard is in a liquid state from heat, without great peril. Those witnesses do not pretend to say that it would have been safe had the decks been ever so tight to carry *this lard* on the open decks, and yet it was like taking it in by the gallon; it had become so melted as to be "more like oil than lard," and there were 300 or 400 casks in that condition. (*fols.* 68, 38.)

III. The effect of melted lard lying on the deck during the voyage, which lasted over a month, would be, and was in fact, to destroy the pitch on the seams, saturate the oakum, and, aided by the excessive heat in the hold, cause it to come out (*fols.* 47, 49.) It is evident that this would be the natural effect of oil upon pitch, and although some of the charterers' witnesses pretend they never heard that it would have that effect, or that it would not during a single voyage, yet they did not and could not say that such would not be the effect. They had no know ledge of the condition of this particular lard when it was shipped, nor of the state of the weather at the time and during the voyage, nor how much it had leaked, nor that it lay in a liquid state upon the decks when discharged; while those witnesses who did see it and who knew all these facts and circumstances, testify that it did have precisely that effect upon the oakum. Thus the surveyor, Le Tellier, who attended upon discharging the cargo, says: "The lard on the between decks had escaped from the barrels, run into the seams, *rotted the oakum*, and so penetrated on to the wheat in the lower hold." He also says, that he examined the caulking and "found that where the lard had settled the oakum was rotten, and where the lard had not settled the oakum was sound." (*fols.* 129, 130.)

Sixth.—There being reasonable ground therefore, for refusing to receive the lard in the condition it was, the consent to receive it notwithstanding its condition, was a good consideration for the promise. Even conceding, for the argument, but for no other purpose, that the master acted improperly and that he should have received the lard, still, as in that case the ship would have been liable to the owners of the other cargo for the damages arising therefrom, he might very properly determine whether to subject the ship to a claim for such damages by receiving and carrying the lard, or to a claim for damages for a violation of the charter, and, therefore, consenting to receive the cargo, was a good consideration for the promise, and the charterers cannot justly repudiate their agreement, and in law they are estopped from doing so. (*Dezell* vs. *Odell*, 3 *Hill*; *Eldred* vs. *Hazlett*, 33 *Penn. R.*, 307.)

If the charterers had owned the entire cargo, and had so induced the master to receive and carry the lard, and other parts of the cargo had been damaged thereby, as in the present case, they would not have had any right of action therefor against the ship, nor could they have recouped or set off the same in an action for the charter money, and the principle is the same in the present case as between them and the ship. (*Mayor* vs. *White*, 7 *Car. & P.*, 41; *Lawrence* vs. *Minturn*, 17 *How.* 100; *Nelson* vs. *Woodruff*, 1 *Black. R.*, 15[illegible].

Seventh.—But notwithstanding their agreement, and all the facts and circumstances in reference to the condition of the lard when received and discharged, the charterers insist that the ship is liable for the damage to the grain, because, as they say, the between-decks were not in the condition required by the charter; that if they had been the lard, which lay thereon in a

liquid state during the voyage, would not have penetrated through and injured the cargo below. This is not so, for the testimony shows that the ship was tight, staunch, and strong, and her between-decks in good condition.

I. *As to the libellants testimony.* The master who chartered the ship and superintended the loading of the lard, says he examined the between decks, and "that they were in good condition; * * they were in fit condition to carry thereon any cargo over dry cargo below." (*fol.* 50.)

Capt. Otis, who commanded the ship on the voyage, says: "The vessel, when she sailed on this voyage, was in good order, tight, staunch, and strong." (*fol.* 70.)

Lincoln, the mate of the ship, says the ship was "tight, staunch, and strong. (*fol.* 153.)

Le Tellier, the Surveyor at Havre, in answer to the 8th interrogatory, says he examined "the caulking, and found that where the lard had settled, the oakum was rotten, and where the lard had not settled, the oakum was sound." (*fol.* 130.)

II. *As to the charterer's testimony:* Mr. Hincken, one of the charterers, who was frequently at the ship while she was receiving her cargo, does not say that the between decks were not in proper condition. He pretends to say that some time after giving the agreement, the master told him that he would not have exacted it if the "between decks had been caulked; that his between decks were open, and that was the reason he exacted the guarantee," (*fol.* 35), and it was upon this testimony that the District Judge appears to have considered that those decks were not in proper condition. This pretended conversation has been contradicted by the master, who, since the appeal to the Circuit, upon further examination, has testified that nothing of

the kind ever occurred; that he never told Hincken he would not have exacted the guarantee if the between decks had been caulked, or that they were open. (*fol* 181, 182.)

The testimony itself was never legitimate, not being part of the *res gestæ*, but a declaration, if made at all, made after the agreement had been acted on by taking in the lard.

It is strange that Hincken made no reply to the improbable statement he testified to, as would have been natural had he supposed the decks to be insufficient, nor did he request to have his guaranty given up and cancelled, as he should have done.

All the facts and circumstances, therefore, show that the master's contradiction of Hincken's statement should be believed.

Mousset, one of the firm of J. Barbe & Co., testified that he knew nothing about the condition of the between decks, nor whether the cargo would have been damaged if they had been properly caulked, nor as to the custom of carrying lard thereon. (*fols.* 94, 114.)

Wanner says that some days after the cargo had been discharged, he went with two others and examined the ship; that they found, by the use of a caulker's instrument, the oakum in the seams rotten in many places, and in his opinion, if the between decks had been in proper condition, there would not have been any leakage or damage. (*fols.* 122, 124.) But he did not see the condition of the lard as it lay in liquid form upon those decks, nor did he know where it so lay, and, therefore, it may be reasonably inferred that the places where he found the oakum to be rotten, were precisely those where the melted lard had laid upon and destroyed it, as testified to by Le Tellier. (*fol.* 130.)

Neither of the other witnesses on the part of the charterers had ever seen the ship, nor did they

know or pretend to testify that the between decks were open or needed caulking. They only testified that ships have carried lard on between decks over grain without injuring it, and from that they erroneously inferred that because there was damage in this case those decks must have been defective, an inference not justifiable in this case.

No doubt, ships have carried lard on those decks in cool seasons of the year and perhaps in the summer, if the weather was cool and the lard hard and in good shipping order when loaded, but no prudent master would have said that this particular lard in the melted and melting state in which it was could have been carried there, no matter how tight the seams of those decks might have been.

An inference against the sufficiency of the decks has been attempted to be drawn, also from the fact that they had not been re-caulked since the ship was first built in connection with a pretended usage to re-caulk sooner; but no such usage was established for the witnesses were obliged to say that they never re-caulked until necessary, and there was no evidence that these decks needed re-caulking.

III.—Having shown a natural and sufficient cause for the rottenness of the oakum in the effect which the lard had upon it, the burden of proof is cast upon the charterers to show affirmatively that at the time of receiving the cargo the decks were not properly caulked. It is not sufficient to rely on a loose inference, that if they had been re-caulked they would have retained the melted lard and so preserved the cargo from damage, or that they might have been so tight as to do this. Even if that were possible the master was not required to put them in such extraordinary condition. All the law required was that they should be in suitable order to carry such cargo as it was proper to stow thereon, when

in good shipping order. (*Amies* vs. *Stevens*, 1 *Strange R.*, 128. *Nemours* vs. *Vance*, 19 *How.*, 162.)

IV. It is insisted, therefore, that according to the weight of testimony the between decks, at the time the lard was shipped, were in a good and suitable condition, such as the charter required, and that the rottenness of the oakum, which was discovered after the discharge of the cargo, was caused by the melted lard which lay thereon during the voyage in connection with the great heat that came from below, and not from any original defect therein.

Eighth.—It is said that the master, through his agents, collected all the freight money upon the bills of lading, and so the charter money was paid. If this were so, it is difficult to see how it would operate as payment of the whole charter money, when the damages in question had been deducted therefrom. But in fact the master did not collect any of the freight. It was all collected by J. Barbe & Co., who were the "friends" and agents of the charterers (*fol.* 76), and who never accounted to the master therefor. The master was instructed by the charterers to call upon them for his charter money, which he did, and which they refused to pay. If by their neglect or bankruptcy the freight money had been lost, the charterers would still have been liable for the charter money.

Ninth.—The exceptions to the libel, as amended and filed in the Circuit Court (*fols.* 187, 188), should be overruled.

I. As to the first exception, that the libel as amended, introduced a new cause of action not founded on the charter, and of which the Circuit Court, as an Appellate Court, had no jurisdiction. This is clearly untenable. There was no new cause of action introduced. The foundation of the libel was the charter party. The agreement modifying it was not a collateral guaranty. It was a simple assumption by the charterers of a liability which they might at the time have contested, growing out of provisions in the charter party, and the kind of cargo they were offering.

The charter determined the rate of freight chargeable on the lard taken under the agreement, and the modification was intended to set at rest any question as to the suitableness of the cargo.

Even if the agreement be treated as new and independent and not as a modification of the charter still the action is not founded thereon, but upon the charter. The action is to recover the balance due under the charter, and the agreement is pleaded in anticipation of the defence that the ship was liable for the damages occasioned by the lard. If the whole cargo had belonged to the charterers and had sustained damage by the lard, and they had undertaken to keep back the amount of such damages from the charter money, the action for the amount withheld must have been founded on the charter. Even if the master had paid the damages and was attempting to recover the same from the charterers, the charter would be the foundation of the action.

II. As to the second exception, that the agreement, upon which the charterers allege this action is founded, is a mere guarantee and not within the admiralty jurisdiction. The agreement is not a guarantee in the sense supposed. It is a contract of affreightment by which the master agreed to receive

and carry the lard in its melted state between decks, the charterers taking upon themselves all the risks of damage to other cargo. It was a contract founded on a good consideration to transport the lard in a particular place under restricted liabilities, and is clearly within the jurisdiction of Courts of Admiralty. (*Morewood* vs. *Enequist*, 23 *How*, 491; *The Yankee Blade*, 19 *id.*, 82.)

Tenth.—The whole defence is technical and without merits. The lard was not in a fit state to be put on board over a cargo of grain. The master had no right to expose his owners to the damage which might naturally be expected to ensue. The objection he made to the charterers simply called for a safer cargo. In answer to it they assumed any damages which might result from the very thing which occurred, the leakage of the lard through the decks. The plainest principles of equity require that they should bear the loss which their agreement induced the master to incur the risk of, and the decree of the Circuit Court should therefore be affirmed with costs.

E. H. Owens &
S. P. Nash,
Counsel for Appellees.

Opinion of Judge Nelson.

Oliver Moses, *et. al.*, *vs.* James I. Boyd *et al.* The libel in this case was filed upon a charter party to recover a balance of $1,779 27 freight. The charter party bore date 24th of July, 1862. The voyage of the ship *Robert Cushman* was from this port to Havre, France. The vessel sailed about the 19th of August, and arrived at Havre 23d of September following. The cargo consisted chiefly of wheat, lard and tallow; the wheat in bulk and also some in bags, was stowed in the hold; a portion of the lard was stowed between decks. The dispute in the case between the parties arises out of damage occasioned to the wheat in the hold by the leaking of the lard between decks, with which the charterers were charged in Havre and paid, and now claim the right to retain the amount out of the charter money, insisting that the vessel is responsible for this loss.

Some difficulty seems to have existed in the Court below in reaching this question on the pleadings; but whatever may have been the merits of the difficulty there, it has been remedied by an amendment of the pleadings in this Court and the question fairly presented. This lard between decks, when delivered at the ship to be taken on board, was badly leaking from the casks, and most of it seemed apparently in an almost liquid state. The weather was excessively hot, so that the hands engaged in the stowage had to be frequently relieved, and some days to lie by in the middle of the day. The stevedore who had charge of the loading refused to take the responsibility of placing the leaking casks between decks, from the danger of damaging the wheat below in the hold, and required the direction of the master, who also objected to taking them, and made his objections known to the charterers. Whereupon they gave him in due form an agreement, before he would assent to the storage, "to pay any damages that yourself (master) or the ship may be subject to, on the discharge of the cargo at Havre—the said damage arising from the lard being

stowed between decks, and running on the other cargo, either in the between decks or lower hold."

This we regard as a modification of the charter party, and it has been so treated in the amended libel, and removes the technical embarrassment of the case in the Court below.

It is admitted that the damage to the cargo in question arose out of the leakage of the lard casks. Some were entirely empty, and over three hundred partially empty when discharged at Havre, and the lard had dripped through the seams of the deck to the cargo below, heated and damaged the wheat, and spread over the between decks.

It is claimed on the part of the charterers that the between decks was not well and sufficiently caulked, and that if it had been, notwithstanding the leaky condition of the casks it would not have worked its way to the lower hold, and hence the ship should be held responsible for the damage; and we agree, if this aspect of the case can be maintained upon the proofs, that the decree should be for the charterers, because the guarantee should not be construed as exonerating the ship from being, in all respects, in a seaworthy condition to carry this description of cargo.

We have, consequently, looked into the proofs on this point, and though there is some conflict of opinion among the witnesses, we are inclined to think that the weight of it does not sustain the allegation of the respondents. The witnesses, who speak of the practice or usage of carrying lard leaking between decks without danger to the cargo below, if the deck is properly caulked, generally qualify the remark as it respects lard in a liquid state in the casks, which, as is apparent from the proofs in this case, was the condition of a considerable portion of this lard when stowed; and as the weather continued hot throughout nearly the whole of the voyage, this state of the lard must have increased rather than diminished. Indeed, the state of the casks when discharged, and of the between decks, go far to confirm the

evidence of their unusual leaky condition when put on board the vessel, which led the stevedore and master to object to them as not fit to be shipped. And the fact that the charterers, instead of insisting upon their right under the charter, chose to modify the same as respected this article, leaves an implication of its unfitness.

Some question was made upon a clause in the charter partly stipulating that the vessel should be consigned to the charterer's friends in Havre, and which was consigned accordingly to the house of J. Barbe & Co. This house received the bills of lading, collected the freight and paid over to the master the amount due, excepting the balance in dispute. They obviously regarded themselves as acting in the interest and for the benefit of the charterers; and we cannot agree that the payment by them of the damages at Havre was a payment as agents of the ship, so as to conclude the owners. They dealt with the freight moneys not only as the friends but as the agents of the charterers, as is apparent from the accounts between the two houses.

We think the Court below erred, and that the decree should be reversed, and a decree entered for the above balance.

Supreme Court

OF THE UNITED STATES.

No. 94.

JAMES R. BOYD, JOHN J. BOYD and EDWARD HINCKEN,
Appellants,

vs.

OLIVER MOSES, CHARLES OWEN, FRANK O. MORE, G. C. MOSES, and ALBERT OTIS.

Brief and Points for Appellants.

E. C. BENEDICT,
Counsel.

Boyd & Hincken chartered the ship Robert Cushman, for Havre, they to load her with any lawful merchandise, and pay 24 cents freight for wheat and equivalent freight for other cargo. When the ship was partly full the master refused to receive lard, (which is lawful merchandise and usual cargo for Havre), between decks, on the ground that it might damage other cargo in the hold and render the ship liable for damages on the discharge of the cargo in Havre, and he required the charterer to give a guaranty to pay such damage. The guaranty was given and the lard was shipped. The master afterwards, when the ship was nearly ready for sea, informed the charterer that the

between decks, had not been caulked and were open, which was the reason why he exacted the guaranty.

When the ship arrived at Havre a part of her cargo was found to be damaged, by lard leaking through the seams of the between decks, which were not properly caulked, and the consignees of it, La Motte & Co., and Schmidt & Co., refused to receive it, and commenced proceedings in the Tribunal of Commerce, to recover damages against the ship, for non-delivery in good order, and recovered 6209$\frac{3}{100}$ francs, (fol. 137.) Those damages and expenses, amounting with the exchange to \$1,779$\frac{27}{100}$, were paid by the consignee of the ship, and charged to the ship's account, and this action is brought by the owners of the ship to recover those damages from the defendants, who were not parties to the suits in Havre, and had no notice of them. It is founded on the agreement "to pay any damage the ship may be subject to on the discharge of the cargo in Havre, the said damage arising from the lard being stowed in the between decks, and running into other cargo, either in the between decks or lower hold." Fol. 172.

The libel articles on the charter party alone, without referring to the agreement (fols. 3 to 8). It was filed February 14, 1863, and alleges that the libellants, on 24th July, 1862, chartered the ship Robert Cushman to the defendants for a voyage from New-York to Havre, on the terms that the ship was "*tight, staunch and strong, and every way fitted for the voyage, and should receive on board*" *the cargo of lawful merchandise to be furnished by the charterers;* that the ship should be consigned to charterers' friends, paying two per cent. commission; and that the charterers should pay twenty-four cents a bushel for wheat, and for other merchandise a fully equivalent freight, to be paid on the discharge of the cargo. And it further alleges that the libellants have, in all things, well and truly performed the covenants

in the charter party, but that the defendants have not performed on their part; that the charter money amounted to the sum of $14,710, and was due on the discharge of the cargo; that a balance thereof, $1,779.27, was not paid and is still due, (*vide* the charter party at length, fols. 53 to 55). The amount of the charter money was fixed at $14,710 by an endorsement on the charter party, (fol. 55), before the vessel sailed.

The answer, fol. 15, denies the performance by the owners of the covenants of the charter party, averring that the vessel was *not sound, tight and staunch, that her decks were not properly caulked*, and were leaky; that her hatches were not properly fastened and caulked, and the vessel was, in other respects, unfit for the transportation of the cargo, whereby it was damaged beyond the libellants' claim; also that the cargo was not properly dunnaged, and not properly stowed and cared for, and that by reason of improper stowage a considerable portion was damaged and not duly delivered and also that the charter money was fully paid and nothing is due—the cargo having been consigned to various parties in Havre, they to pay freight, and bills of lading taken by the master and owners, and on them freight collected by them or their agents sufficient to pay and discharge the charter money.

These were the allegations to be tried in the District Court.

The cause was tried on the 16th day of June, 1865, in the District Court before Judge Betts, fol. 19. The libellants put the guaranty in evidence, subject to objection, as the ground of their claim. The District Court dismissed the libel. Decree, fol. 157.

The following is the opinion of the District Judge:

U. S. DISTRICT COURT.

OLIVER MOSES, *et al.*,

vs.

JAMES BOYD and EDWARD HINCKEN.

Opinion.

This was an action on a Charter Party. On July 24, 1862, the ship Robert Cushman, of which the libellants were owners, and Captain Otis was Master, was chartered to the respondents for a voyage from New-York to Havre. The charter provided, among other things, that the ship should be tight, staunch and strong, and every way fitted for such a voyage, and should receive on board a cargo of lawful merchandise, and that she should go "consigned to charterers' friends." Boyd & Hincken sent down grain as part of the cargo, enough to fill the lower hold, and then sent down lard. The weather was very warm and the lard was leaking. The master of the vessel objected to receiving the lard to carry in the between decks, on the ground that it would injure the grain. The respondents insisted on his taking the lard as lawful merchandise, but wrote him a letter saying:

"We understand that you object to our shipping lard in the between decks of your ship; we ask you to have all the lard received and we hereby agree to pay damages

that yourself or ship may be subject to on the discharge of the cargo at Havre; the said damage arising from the lard being stowed in the between decks and running on to the other cargo, either in the between decks or lower hold.

"Yours truly,

"BOYD & HINCKEN."

The lard was thereafter taken on board and stowed in the between decks. One of the respondents testified on the trial that the master told him he should not have asked for the letter, if he had not known that the deck of the between decks was not tight. The vessel, having received her cargo, set sail. The master, on her arrival at Havre, handed the bills of lading which he had brought with him to J. Barb & Co., to whom, as the "charterers' friends," she had been consigned, and they proceeded to discharge the ship and collect her freight. Part of the grain was found to have been injured by the lard which had leaked through the between decks, and legal proceedings were taken which resulted in a decision that the injury was the result of the between decks not being tight, and that the ship was liable for the damage, which amounted to $1,779.27. The consignees collected the freight, amounting to $——, paid the damages, and paid the captain the difference between that and the amount of his charter.

The owners of the ship then brought this action against the respondents on the charter. Their libel sets forth the charter, alleges its performance and the amount of the charter money, and that there still remained unpaid by the respondents the sum of $1,779.27, for which they prayed a decree. The respondents answered, denying that the ship had performed the charter, inasmuch as she was not "tight and staunch" etc., but her between decks were not caulked,

and averring that the master had received the bills of lading, and by his agents in Havre had collected the freight, and had been paid all that was due on the charter.

On the trial the facts above set forth were proved. Some testimony was given by the libellants to show that it is the tendency of lard to rot the oakum in the seams of the ship, but evidence was given by the respondents that it could not have this effect during so short a period, and that the between decks of this vessel had not been caulked for several years, and were not tight.

The libellants claimed that Barbe & Co., in the payment of the damages at Havre, were not the agents of the ship but of the charterers, and that at any rate the respondents had by their letter guarantied them against the damages. The respondents claimed that Barbe & Co. were the ship's agents, and that the letter was no evidence in this action on the charter, and was obtained by misrepresentation.

Held by the Court—

That it is a fundamental principle in the Admiralty, that the proceedings shall be conducted and controlled rigorously in conformity to the allegations and proofs made the foundations of the suit or defense under prosecution, and that no departure from such a rule is allowable to either party on the trial of the cause before the Court, or in its decision. (Benedict's Pr., Sec. 370; Ware's Rep., 44; 2d Curtis' Rep., 265; 7 Cranch, 389; Dunlap's Pr., 113.)

That it accordingly devolves upon the libellants to maintain the verity of their allegations as to the condition and soundness of the ship.

That, on the evidence, the vessel was not tight, staunch, strong, and fitted for the voyage she contracted to perform, and the damages were recovered against her in Havre on that ground.

That, on the evidence, the vessel was legally bound by

the usage of trade to accept and carry the lard under the charter party.

That the letter given by the respondents to the master, was therefore without consideration and formed no part of the charter contract.

That the Master is proved to have known that the ship was not fit for that particular service, and to have obtained the letter because he knew the between decks were not tight.

Libel dismissed with costs.

Messrs. OWEN, GRAY & OWEN, *for Libellants.*

Messrs. BENEDICT, TRACY & BENEDICT, *for Respondents.*

The case was then appealed to the Circuit Court, *vide* the appeal, fols. 161 to 163.

In the Circuit, without any order of the Court, the libellants amended their libel, introducing a new cause of action on the letter of guaranty, *vide* amended libel, fols. 167 to 176. The new matter is found in folios 171 to 175.

To this new libel the defendants excepted, *vide* Exceptions, fols. 187, 188, and put in an answer, fols. 189 to 198.

The amended libel, after stating the charter party, avers that the ship was not bound to take the lard, and refused to do so, whereupon the agreement was made and the master took the lard, and by reason of the premises the respondents are estopped from alleging that the loss was caused by leaky decks, or that it was good stowage to put lard between decks, or that the ship was bound to take the lard without the agreement, and that the consignees of the ship had no right to charge the damages to the ship, but should have charged them to the charterer.

The exceptions are, 1st, that the amendment to the libel in the Appellate Court, introduces a new cause of action

founded on the agreement of guaranty, and not on the charter party, which being an original cause of action, the Circuit Court being only an Appellate Court, has no jurisdiction to hear; and 2nd, that that cause of action is not a maritime cause of action and is not cognizable in the Admiralty, being simply a Common Law undertaking of guaranty, not within the Admiralty jurisdiction of the District Court or the Circuit Court.

The answer to the amended libel alleges that the vessel was not tight, &c.; that the cargo was not properly dunnaged, nor properly stowed, nor duly delivered; that the freight payable by the bill of lading was more than enough to pay the charter; that the bills of lading were retained by the master that he might collect the freight, and thus secure his charter money; and that the freight was thus collected by the consignees and agents of the ship and the charter money thus fully paid; that lard was lawful and proper merchandise, which the charterers were entitled to ship, the ship being chartered as a general ship, on the understanding and the covenant that she was in good condition; that if cargo was damaged it was the negligence of the ship; that the agreement of guaranty was without consideration and had no validity—certainly none against the negligence of the ship, and could not operate as an estoppel against setting up a just defense to an action founded on false and fraudulent representations by concealing the true and suggesting a false condition of the ship and cargo.

That the ship, as provided in the charter party, was consigned by the master, not by the charterer, to J. Barbe, at Havre, a commercial friend, but not the agent of the charterer, and as the agent of the ship and master that house did the ship's business, collected and paid over the freight and paid the disbursements of the vessel.

That the cargo being damaged by the bad stowage and

transportation of the libellants, suits were brought in the French Courts, to which the charterers were not parties, and of which they had no notice, and for causes of action for which they were not responsible, to recover from the owners the damages for negligence which they were decreed to pay, and this action is on the guaranty to compel the charterers to indemnify the owners against such recovery for their own negligence.

Capt. Wm. M. Otis was examined anew in the Circuit Court; *vide* his deposition, fol. 179; all his answers are the monosyllabic, "No, sir."

POINTS.

I.—The lard was lawful merchandise, which under the charter party the ship was bound to receive as cargo, together with grain, and she was bound to stow the whole safely.

Capt. Funk who had been in the Havre trade 40 years says: "I have generally carried grain in the lower hold, and between decks and all over the ship," and "Lard between decks,"—has "carried lard often" between decks all times of the year, fol. 26 and 27.

Capt. Sampson, with 37 years experience says: it is common to carry lard and grain on the same ship; grain in the lower hold—lard in lower hold and between decks.

Mr. Hincken, the claimant, 30 years in the Havre trade, says the same, fol. 32.

Capt. Stetson, 19 years to European ports, last 10 years to Havre in first class vessels, says the same, fol. 83 to 85.

Capt. Kelly, says the same, fol. 89 to 92.

Henry Simpson, Stevedore 41 years, says the same, fol. 42, 43.

On the other side are only the testimony of Philips the stevedore who stowed this vessel, and Otis the master, who had never made a voyage in the Havre trade. Philips testifies evasively.

II.—It was the duty of the ship to have the between decks water-tight and lard-tight—as tight as the sides of the ship or the main deck.

It was covenanted in the charter party that she should be "tight, staunch and strong, and *every way fitted for the said voyage*," that is, a voyage from New-York to Havre, in midsummer, in which trade lard is usual cargo, and is well known always to leak at that season. A new ship always shrinks the first year, and she should be caulked always at the end of the first year, and afterwards as often as she needs it; she must be kept tight.

So says Capt. Harding, a ship-master of 30 years experience, and surveyor of the French Lloyds. Fol. 24, 25.

"They ought to be tight, of course, in taking in cargo." "I never looked upon a ship as fit to take in cargo, unless the between decks are tight." "It requires to be tight, of course, or the lard would leak through." Funk, fol. 27.

Water-tight, liquor-tight. Sampson, 29,30.

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This is the true interpretation of the covenant in the charter party.

III.—The between decks of the ship were not tight. This was known to Capt. Otis, and was not known to Boyd & Hincken.

This ship had never had her between decks re-caulked since she was built!

Capt. Otis, says, April 16, 1863, "she is a little over four years old. I have commanded her for about three years and-a-half," (fol. 66). So that he had commanded her ever since she was built, except for a small part of a year.

"We did not have our between decks caulked while the vessel was here. They had not been caulked since I had been in the ship; I had been in the ship about three years then, when we commenced this voyage." Capt. Otis, fol. 71.

"He (the captain) told me that he would not have exacted the guaranty, if his between decks had been caulked; that his between decks were open, and that was the reason he exacted the guaranty from me. That was the first I knew that the between decks had not been caulked." Hincken, fol. 35.

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"If there was dry cargo below they (the between decks) were not fit to carry liquid cargo or lard." Otis, Fol. 51

IV.—The damage to the cargo was caused by the between decks not being tight.

Warner, appointed by the Tribunal of Commerce to examine the ship, says "we found the oakum in the seams rotten, or the entire absence of oakum. This was ascertained by the use of the caulkers' instruments." Fol. 121.

"The damage was occasioned by leaking through the seams of the between decks." "I saw at the examination, the tracings of the drippings of the grease through the seams of the between decks." "In my opinion, had the between decks been in a proper condition, there would have been no leakage, and consequently no damage from that portion of the cargo to that in the hold," fol. 122.

"I went on board the Robert Cushman with two other gentlemen appointed by the Tribunal of Commerce for the purpose, and examined the between decks, and in many places the instrument went through the seams as if there was no substance to resist it. We took into our hands what was used as caulking, and in many instances it had lost the appearance of oakum. It was a bad, rotten substance, which could not resist the passage of such a substance as lard." Fol. 125.

Capt. Otis himself says: "The lard or grease had leaked through upon the grain below, and this was what caused the damage to the grain below." Fol. 69.

V.—It was the business of the owner to put the ship in good condition to carry this lawful and usual cargo. The owner represented her to be so, and covenanted in the charter that she was so, and under the charter, the charterer had a right to assume that she was so.

That the ship was bound to take the lard on freight and carry it safely under the charter, is held by the District Judge and also by the Circuit Judge, by the District Judge directly, and the Circuit Judge by his putting the right to recover on the letter of guaranty, as a modification of the charter party.

The letter of indemnity or guaranty was given under these circumstances. The hold of the ship was already full of grain in bulk and tallow (fol. 37), and lard (fol. 46), and the between decks partly full of similar goods (fol. 39), and other lard which had been accepted was on deck and on the dock waiting for stowage, and all without objection, when Mr. Nesbitt, the ship's agent, and Otis, the master, came to Mr. Hincken and told him that the ship would not take the lard between decks, unless he would give an agreement to hold the ship harmless, and that was the reason he gave that letter (fol. 48). Mr. Hincken says, "I told him there was no danger in carrying lard between decks." I said there was no objection to taking it there; that all our ships carried it there, and he should too, (fol. 33). "Nothing was said about the decks being tight. I said I would guaranty. Mr. Nesbitt wrote a guaranty and I signed it," (fol. 34).

It was not until "the ship was nearly loaded and the between decks very nearly full" (fol. 34,) that the Captain told Mr. Hincken that the reason why he had exacted the guaranty was because the between decks were open and had not been caulked. Fol. 35.

It was then too late to do anything but wait the result and resist any claim on the guaranty.

Captain Otis, in his deposition in the Circuit Court, denies that he ever told him so. Fol. 182.

That the between decks were open and leaky is be-

yond dispute. It is not very material whether that fact was concealed, only till the ship was full, or till the end of the voyage.

The suppression of that fact was a suggestion of the falsehood that the ship was in good condition for such a voyage and such a cargo and vitiates the guaranty.

VI.—The guaranty contained in the letter is without consideration. Its true interpretation as an undertaking is: If you will take the lard on board, that is to say, if you will do what you are by law bound to do; if you will perform the charter party which you have made, and are penally bound to perform, we assume and will pay any damages which may be caused by your negligence in carrying, or your not delivering other cargo in good condition. If the lard should be taken on board and carried, the ship would not be liable for any damages except from her own negligence. This is then an undertaking to be responsible for the negligence of the ship in consideration of her undertaking to do what she was by law bound to perform.

That a promise to do, what a person is bound to do by law, is not a good consideration for another's undertaking, and that a person is not bound to fulfil his promise to pay another for doing what he is bound by law to do, is familiar law.

The well known cases of promises by masters of vessels, to pay sailors extra for only doing their duty, illustrate this.

Harris *vs.* Watson, Peake, 72.
Stilk *vs.* Myrick, 2 Campbell, 317.

So of a promise to pay pilots for assisting a vessel in distress, such being made their duty by law.

Callaghan *vs.* Hallet, 1 Caine, Rep. 104.
Crowhurst *vs.* Lanerick, 16 Eng. L. & E. Rep. 497 and note.

"So a promise to pay extra compensation to a witness, obliged by law to attend upon subpœna, is not binding."

Willis *vs.* Peckham, 1 Broderick & Bing, 515.
Collins *vs.* Godefrey, 1 B. & Ad. 950.

And see

Smith *vs.* Bartholomew, 1 Metcalf, 276.
Miller *vs.* Holbrook, 1 Wend. 317.
Deacon *vs.* Gridley, 28 Eng. L. & E. Rep. 345.
Rann Ex'r *vs.* Hughes, Adm. 7 D. & E. 346, note.

(*a.*) This was an undertaking made in New York, and is "a special promise to answer for the debt, default or miscarriage of another person," in which case, unless there be a writing expressing the consideration, the agreement is void, by the statute of frauds of that State, for it expresses no consideration.

2 Rev. Stat. 135, marginal page.

(*b.*) This is said to be a modification of the charter party. How can that be so? The charter party is not referred to in it, directly nor indirectly. This agreement has no mutuality. It is one-sided —signed by only one party—while the charter party is a formal instrument in two parts, and

signed by both parties. It is very clearly an independent undertaking of guaranty.

There is nothing gained by saying that it is a modification of the charter party (except, perhaps, on the question of admiralty jurisdiction). A charter party is a deliberate and solemn instrument—none more so in the maritime law—and an agreement to modify such an instrument in its most vital part—to transfer the responsibility for a bad and leaky ship from the ship-owner who receives the freight for carrying safely, to the shipper who provides the cargo and pays the freight—is no more valid, without a consideration, than any other contract.

(*c.*) It is also said that by this guaranty the respondents are estopped from proving that the damage was *caused* by leaky decks. But it says nothing about leaky decks, or good stowage, or the libellants being bound to receive the lard. If these things had been referred to, there might have been some ground to say that they were estopped.

(*d.*) If it be true, as held by both the courts below, that on the charter party, without the letter of guaranty, it would be impossible for the libellants to recover, then the action is really and truly on the guaranty.

The violation of that undertaking, is set up as the cause of action. [There must be an undertaking on which to recover; this is set up as an

undertaking and must have a consideration, or be void. But there can be no recovery on an estoppel. It cannot be made the subject of an action. If it be relied upon as an estoppel, there can be no recovery.

(e.) The amended libel says that the master waived his objections, in consideration of the agreement, and covenanted to receive, and did receive the lard and stow it in the between decks. Where is this covenant, and what are its terms?

This covenant is nowhere expressed, except in the charter party, and the allegation in the libel is in substance, that in consideration thereof, the charterers covenanted to indemnify the owners against any recovery which may be had against them, on the discharge of the cargo at Havre, for damage arising from lard properly stowed in the said between decks, and running upon other cargo.

VII.—Barbe, the consignee of the ship in Havre was not the agent of the charterer, but of the ship and her owners.

Captain Otis says, "the ship's agents on the other side, at Havre, were J. Barbe." Fol. 71.

Boyd & Hincken had no power to consign the ship on the other side. The master alone could consign her.

The Captain says, "I was instructed by them (Boyd & Hincken,) to consign my vessel upon arrival at

Havre, to J. Barbe & Co., (these were Boyd & Hincken's friends, not agents, fol. 36, 37,) merchants of that city. I think I signed a letter consigning the vessel to them which Boyd & Hincken took to send to that house. I am quite sure that I signed such a letter. * * It is usual and customary when vessels were chartered as mine was, to do so." Fol. 75.

"On my arrival at Havre, I placed the vessel in the hands of J. Barbe & Co. This was by directions of the charterers. Fol. 68.

"I handed to Barbe & Co. my bills of lading, when I got to Havre, all of them, for the purpose of collecting the freight. I handed them also my charter party, and after I consigned my vessel to them, I had nothing to do with collecting the freights, and the business of the vessel for this voyage to Havre. I left it to them—in fact all spoke French there, and I could not speak French." Fol. 79.

Barbe, the consignee and agent of the ship, collected the whole freight and gave the ship credit for $14,710, and Boyd & Hincken for the residue, $502, (fol. 115.) Of the $14,710, they retained 10,102 francs, to pay the judgments in the pending litigations for damage. Of the 10,102 francs, 6,209$\frac{7}{100}$ were paid for judgments and expenses, (fol. 137,) and the balance remitted to Baring Bros., for the owner. Fol. 140, Decr. 19.

It is for the 6,209$\frac{7}{100}$ francs, that this action is brought.

VIII.—There was no cause of action on the guaranty in the District Court. It was not alleged in the pleadings, and was ruled out of the evidence by the Court; the cause in the District Court was on the charter party pure and simple, as the pleadings show. The action in the Circuit Court was on the guaranty; of this, as an original cause of action, the Court had no jurisdiction, only appellate jurisdiction; and the amendment of the libel in the Circuit, by inserting a new and original cause of action, without leave of the Court, was irregular; and for that the decree must be reversed.

IX.—That guaranty is not a maritime instrument, and the cause of action on it is not a maritime cause of action.

The Courts of the United States in admiralty have no jurisdiction of it. It is a matter of purely common law cognizance. It is an undertaking, without consideration, to pay to A what B may recover against him in a court of law in France.

The guaranty was never in France. Barbe & Co. never heard of it. It was not intended for use there in settling up the voyage, but here, after the voyage was settled up in France, and after the amount of damage, if any, was ascertained and paid there.

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